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TEXAS CIVIL PROCEDURE

by

Ernest E. Figari, Jr. *

THE major developments in the field of civil procedure during the survey period are found in judicial decisions and amendments to the Texas Rules of Civil Procedure.¹ This Article examines these developments and considers their impact on existing Texas procedure.

I. JURISDICTION OVER THE PERSON

The most significant development in the area of jurisdiction over the person was the decision of the United States Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*.² The plaintiffs had purchased a new automobile from a retail dealer in New York, and were injured when they were involved in a collision in Oklahoma while on their way from New York to Arizona. The plaintiffs subsequently filed suit in Oklahoma on a products liability theory against the manufacturer of the automobile, its importer, its regional distributor, and its retail dealer. The retail dealer and regional distributor, whose business was virtually confined to the east coast, contested the assertion of personal jurisdiction. The trial court overruled their objection, and the Oklahoma Supreme Court affirmed, observing that the dealer and distributor could have foreseen the automobile's "possible use in Oklahoma."³ The United States Supreme Court reversed, citing as a basis for its decision the absence of "affiliating circumstances" that are a prerequisite "to any exercise of state-court jurisdiction."⁴ While

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1. As a result of the amendments, 72 rules were modified, 22 new rules were added, and 20 rules were repealed. These changes became effective Jan. 1, 1981. See *Rules of Civil Procedure—New Amendments*, 43 TEX. B.J. 767 (1980). See generally Pope & McConnico, *Practicing Law with the 1981 Texas Rules*, 32 BAYLOR L. REV. 456 (1980).

2. 444 U.S. 286 (1980).

3. 585 P.2d 351, 354 (Okla. 1978).

4. 444 U.S. at 295. With respect to the lack of contacts between the dealer and distributor and the forum state, the Court noted that:

Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in

conceding that due process limitations on state jurisdiction "have been substantially relaxed over the years,"⁵ the Court reiterated that "the Due Process Clause 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.'"⁶

Rejecting the "possible use" test enunciated by the Oklahoma appellate court, the Supreme Court stated that "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way in the forum State,"⁷ rather "it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."⁸ Reaffirming the vitality of the "stream of commerce" theory of personal jurisdiction,⁹ the Court specifically noted that "[t]he forum State does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."¹⁰

The reach of the Texas long-arm statute, article 2031b,¹¹ continues to be the subject of judicial measurement. *Oswalt v. Scripto, Inc.*,¹² a recent Fifth Circuit decision, provides impetus to the "stream of commerce" theory of personal jurisdiction in its application of *World-Wide Volkswagen* to a case involving a defective cigarette lighter. The plaintiff claimed that she had been seriously burned when a cigarette lighter that she had purchased malfunctioned, and she brought suit in Texas against the distributor and the manufacturer of the lighter. The manufacturer, a Japanese corporation, was served under article 2031b, and it responded with a motion to dismiss for lack of personal jurisdiction. The trial court found that although the manufacturer " 'should have known or could expect the product would reach the forum,' "¹³ the due process clause precluded the assertion of jurisdiction because the manufacturer did not have "actual knowledge" that the lighter would be marketed in Texas.¹⁴ The Fifth Circuit reversed, holding that the fact that the manufacturer had reason to know that the lighter would reach Texas was sufficient to meet the test of *World-Wide Volkswagen*.¹⁵ In upholding personal jurisdiction on this ba-

New York to New York residents, happened to suffer an accident while passing through Oklahoma.

5. 444 U.S. at 292.

6. 444 U.S. at 294 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

7. *Id.* at 297.

8. *Id.*

9. See, e.g., *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1234 (5th Cir. 1973), discussed in Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 28 Sw. L.J. 248, 249 (1974); *Coulter v. Sears, Roebuck & Co.*, 426 F.2d 1315, 1320 (5th Cir. 1970); *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591, 596 (5th Cir. 1969).

10. 444 U.S. at 297-98.

11. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1980-1981).

12. 616 F.2d 191 (5th Cir. 1980).

13. *Id.* at 198.

14. *Id.*

15. *Id.* at 200. According to *World-Wide Volkswagen*, the requirements of due process

sis, the court emphasized that the lack of actual knowledge on the part of the manufacturer was irrelevant because no distinction should be drawn with regard to whether the defendant "knew" or "should have known" that the product would reach the forum.¹⁶

The case of *Southwest Offset, Inc. v. Hudco Publishing Co.*¹⁷ is significant because it confirms the fact that the Texas Supreme Court has a more restrictive view of the federal due process requirements for nonresident service than the federal courts. Because it is well-settled that article 2031b reaches as far as the federal constitution will permit,¹⁸ any challenge to service under the statute reduces to an inquiry into whether due process is satisfied.¹⁹ During a previous survey period the Texas Supreme Court, apparently overlooking federal authority that had sustained nonresident service in analogous situations,²⁰ concluded in *U-Anchor Advertising, Inc. v. Burt*²¹ that a defendant's contacts with Texas did not satisfy federal constitutional requirements and, therefore, affirmed the trial court's dismissal for lack of personal jurisdiction.²² Questioning *U-Anchor's* interpretation of the fourteenth amendment and returning the focus of inquiry to federal authority, the Fifth Circuit in *Southwest Offset* concluded that federal courts need not be bound by state court interpretations of constitutional requirements.²³

Section 3 of article 2031b authorizes the exercise of jurisdiction over a nonresident when he is "doing business" in Texas.²⁴ "Doing business," as defined by section 4, includes entering into a contract by mail or otherwise with "a resident of Texas" to be performed by either party in whole or in

are satisfied in a products liability case when the defendant causes its goods to enter the stream of commerce "with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen, Inc. v. Woodson*, 444 U.S. 286, 298 (1980).

16. 616 F.2d at 200.

17. 622 F.2d 149 (5th Cir. 1980) (per curiam).

18. See, e.g., *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977), cert. denied, 434 U.S. 1063 (1978); *Michigan Gen. Corp. v. Mod-U-Kraf Homes, Inc.*, 582 S.W.2d 594, 595 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

19. See *Southern Nat'l Bank v. Tri Financial Corp.*, 317 F. Supp. 1173, 1191 (S.D. Tex. 1970), modified on other grounds sub nom. *Southern Nat'l Bank v. Crateo, Inc.*, 458 F.2d 688 (5th Cir. 1972). The district court stated that "[t]his test . . . reduces to due process, for the long arm of Texas has as great a reach as due process permits." 317 F. Supp. at 1191.

20. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974).

21. 553 S.W.2d 760 (Tex. 1977), cert. denied, 434 U.S. 1063 (1978).

22. 553 S.W.2d at 761. The plaintiff, a Texas advertising firm, brought suit in Texas against an Oklahoma resident to collect sums due under a written contract. Service was effected by means of TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1980-1981). The contract was solicited in Oklahoma by the plaintiff and was executed by both parties in that state. With respect to performance, the contract required the plaintiff to erect advertising displays in Oklahoma and obligated the defendant to send payment to the plaintiff's offices in Texas. The defendant mailed checks to Texas, but had no other contacts with the state. On the basis of these facts, the court concluded that the defendant's contacts with Texas did not satisfy federal constitutional requirements, and affirmed the trial court's dismissal for lack of personal jurisdiction. 553 S.W.2d at 764; see Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 32 Sw. L.J. 407, 408-09 (1978).

23. 622 F.2d at 152; accord, *Docutel Corp. v. S.A. Matra*, 464 F. Supp. 1209, 1219-20 (N.D. Tex. 1979) (memorandum decision).

24. TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon 1964).

part in this state.²⁵ The reference to "a resident of Texas" has posed a problem for the nonresident plaintiff seeking to effect service upon a nonresident defendant in a Texas court under article 2031b. The question arises whether the residency requirement excludes from the definition of "doing business" one nonresident's contractual relations with another nonresident even though the contract is to be performed in Texas. This question was answered in the negative by the court of civil appeals in *Rosemont Enterprises, Inc. v. Lummis*.²⁶ Relying on *U-Anchor*,²⁷ the *Rosemont* court concluded that "if the transaction at issue meets the constitutional requirement of due process a suit thereon is justiciable in Texas even though neither party is a resident of the state."²⁸

Two recent federal cases, *Dotson v. Fluor Corp.*²⁹ and *K.L. Cattle Co. v. Bunker*,³⁰ also are instructive in the interpretation of the Texas long-arm statute. Because article 2031b recently was amended to expand the definition of "doing business,"³¹ the court in *Dotson* considered the question of whether the amendment could be given retroactive application. Concluding that such a construction was permissible under the Texas Constitution because the amendment was remedial and procedural and did not affect any vested rights of the defendant, the court sustained personal jurisdiction on the basis of the expanded definition.³² In *K.L. Cattle Co.* a foreign executrix challenged the plaintiff's attempted service on her under article 2031b. Noting that if the decedent were still alive, jurisdiction over his person would have been proper, the court turned to the question of whether the decedent's contacts with the forum could be imputed to the representative of his estate.³³ Based on its review of existing authorities, the court concluded that jurisdiction over a nonresident personal representative may not properly be asserted when service on a nonresident executor or administrator is not expressly provided for in the long-arm statute.³⁴ Finding no reference to personal representatives in article 2031b, the court ruled in favor of the foreign executrix.³⁵

The Texas Supreme Court concluded during an earlier survey period

25. *Id.* § 4 (Vernon Supp. 1980-1981).

26. 596 S.W.2d 916 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

27. 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

28. 596 S.W.2d at 920; *see* *National Truckers Serv., Inc. v. Aero Syss., Inc.*, 480 S.W.2d 455, 458 (Tex. Civ. App.—Fort Worth 1972, writ *ref'd n.r.e.*).

29. 492 F. Supp. 313 (W.D. Tex. 1980).

30. 491 F. Supp. 1314 (S.D. Tex. 1980).

31. *See* TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (Vernon Supp. 1980-1981). *See generally* Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 34 Sw. L.J. 415, 418 (1980).

32. 492 F. Supp. at 315. Two earlier cases held that a statute authorizing substituted service could be applied retroactively. *See* *Muchard v. Berenson*, 307 F.2d 368, 370 (5th Cir. 1962), *cert. denied*, 371 U.S. 962 (1963); *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 185 F. Supp. 48, 51-52 (S.D. Tex. 1960), *rev'd on other grounds*, 288 F.2d 69 (5th Cir. 1961). *But see* *Rozell v. Kaye*, 201 F. Supp. 377, 379 (S.D. Tex. 1962); *Rozell v. Kaye*, 197 F. Supp. 733, 735 (S.D. Tex. 1961).

33. 491 F. Supp. at 1315-16.

34. *Id.* at 1316.

35. *Id.*

that service under article 2031b is not completed until process is forwarded by the designated state official to the nonresident defendant and, in order to establish the jurisdiction of the trial court over the defendant's person, the record must affirmatively show that the process was forwarded.³⁶ Faced with an attempt by a plaintiff to cure such a defect retroactively, the court in *Cars & Concepts, Inc. v. Funston*³⁷ concluded that the required showing must appear of record before a default judgment is rendered. Thus, the court held that curing an omission after a default judgment, even while the judgment remains interlocutory, will not suffice.³⁸

One final development in the area of personal jurisdiction should be of interest to the trial attorney. *Meineke Discount Muffler Shops, Inc. v. Feldman*,³⁹ a recent decision by a federal district court, holds that a party may contract in advance to submit to in personam jurisdiction in a Texas court, and that the contract will be enforced in this state.⁴⁰

II. SPECIAL APPEARANCE

Rule 120a, which governs special appearances to challenge personal jurisdiction in state court, requires that such an appearance "shall be made by sworn motion" filed prior to any other pleading or motion.⁴¹ As originally adopted, rule 120a contained no provision allowing an amendment of the special appearance motion to correct a deficiency.⁴² As a result, the filing of an unsworn motion constituted a general appearance and subjected the movant to the jurisdiction of the court for all purposes.⁴³ The amended version of rule 120a, however, permits amendment of a special appearance motion in order to cure a defect.⁴⁴ Focusing on this aspect of the rule, *Stegall & Stegall v. Cohn*,⁴⁵ following an earlier case,⁴⁶ held that rule 120a permits an amendment to verify the motion.⁴⁷ Because rule 120a authorizes a defendant to make a special appearance for the limited pur-

36. *Whitney v. L & L Realty Corp.*, 500 S.W.2d 94, 96 (Tex. 1973). The required showing is usually made by filing a certificate of mailing issued by the Texas secretary of state. See Figari, *supra* note 9, at 248 n.7.

37. 601 S.W.2d 801 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

38. *Id.* at 803.

39. 480 F. Supp. 1307 (S.D. Tex. 1979) (memorandum decision).

40. *Id.* at 1309; *cf.* *Monesson v. National Equip. Rental, Ltd.*, 594 S.W.2d 780 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (judgment obtained in New York on basis of prior contractual consent by defendant to personal jurisdiction held enforceable).

41. TEX. R. CIV. P. 120a.

42. See TEX. R. CIV. P. 120a (1966).

43. *Stewart v. Walton Enterprises, Inc.*, 496 S.W.2d 956, 959 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); *Austin Rankin Corp. v. Cadillac Pool Corp.*, 421 S.W.2d 733, 734 (Tex. Civ. App.—Beaumont 1967, no writ).

44. TEX. R. CIV. P. 120a. See generally Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 30 Sw. L.J. 293, 294 (1976).

45. 592 S.W.2d 427 (Tex. Civ. App.—Fort Worth 1979, no writ).

46. *Dennett v. First Continental Inv. Corp.*, 559 S.W.2d 384, 385 (Tex. Civ. App.—Dallas 1977, no writ); *cf.* *Duncan v. Denton County*, 133 S.W.2d 197 (Tex. Civ. App.—Fort Worth 1939, writ dismissed) (amendment of unsworn controverting affidavit to add verification permitted).

47. 592 S.W.2d at 429.

pose of questioning whether he is "amenable to process,"⁴⁸ two cases during the survey period concluded that such a motion cannot be used to raise the issue of lack of subject matter jurisdiction.⁴⁹

III. SERVICE OF PROCESS

Rule 106,⁵⁰ which governs service of process in state court, directs that service is to be effected by the designated officer upon the defendant either by personal delivery or by mailing the process in a prescribed manner to the defendant. Furthermore, when securing service by these preferred methods is impractical, rule 106 authorizes the trial court, upon motion, to order substituted service upon the defendant by one of several acceptable methods.⁵¹ Interpreting an earlier version of rule 106 strictly, the court in *Harrison v. Dallas Court Reporting College, Inc.*,⁵² addressed the impracticality requirement and concluded that a plaintiff seeking to secure an order permitting substituted service must offer proof that *both* of the preferred methods are impractical before substituted service can be authorized.⁵³ As an apparent attempt to reduce the impracticalities flowing from the holding in *Harrison*, rule 106 was recently amended to authorize substituted service where the plaintiff establishes that service by either of the two preferred methods has been attempted unsuccessfully.⁵⁴

The failure of former rule 106 to delineate the proof requirements of a motion seeking substituted service posed a serious dilemma for plaintiffs.⁵⁵ Addressing this problem, amended rule 106 specifies that a motion for substituted service be "supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found" and "the facts" showing that service has been attempted under one of the preferred methods "at the location named in such affidavit but has not been successful."⁵⁶

The cases of *Hurd v. D.E. Goldsmith Chemical Metal Corp.*⁵⁷ and *Ex parte Wood*⁵⁸ clarify two issues in the area of substituted service. In *Hurd* a substituted service authorized by the trial court to be made at the defend-

48. TEX. R. CIV. P. 120a.

49. *Estate of Griffin v. Sumner*, 604 S.W.2d 221, 226 (Tex. Civ. App.—San Antonio 1980, no writ); *Oliver v. Boutwell*, 601 S.W.2d 393, 395 (Tex. Civ. App.—Dallas 1980, no writ).

50. TEX. R. CIV. P. 106.

51. *Id.* The 1980 amendment to rule 106 decreased the number of acceptable methods of substituted service. Compare *id.* with TEX. R. CIV. P. 106 (1978).

52. 589 S.W.2d 813, 815 (Tex. Civ. App.—Dallas 1979, no writ).

53. *Id.* at 815-16.

54. TEX. R. CIV. P. 106; see Pope & McConnico, *supra* note 1, at 486-87.

55. See *Harrison v. Dallas Court Reporting College, Inc.*, 589 S.W.2d 813, 815-16 (Tex. Civ. App.—Dallas 1979, no writ) (motion supported by affidavit failing to detail number and times of attempts at personal service held insufficient); *Kirkegaard v. First City Nat'l Bank*, 486 S.W.2d 893 (Tex. Civ. App.—Beaumont 1972, no writ) (motion unsupported by officer's affidavit held insufficient).

56. TEX. R. CIV. P. 106(b).

57. 600 S.W.2d 345 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

58. 590 S.W.2d 568 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

ant's usual place of business was invalidated because the serving officer's return omitted to state that the address at which process was left was the usual place of business of the defendant.⁵⁹ The court in *Hurd* found it insufficient for the return to state only that a copy of the citation and petition were left at a certain address without including the statement that the address is the defendant's usual place of business.⁶⁰ The court in *Wood* focused on the portion of rule 106 that permits the trial court to authorize service to be made "by any disinterested adult named by the court in its order" where service by an officer is impractical,⁶¹ and invalidated a substituted service because the order authorizing such service did not identify the adult by name.⁶²

Previously, service of process upon a defendant could be made only by the sheriff or constable of the county in which the defendant was located.⁶³ With the goal of expediting the effectuation of service,⁶⁴ rule 103 has been amended to permit also service by mail to be made by the sheriff or constable of the county in which the case is pending, regardless of the defendant's location.⁶⁵ Moreover, amended rule 103 now permits service by registered or certified mail and citation by publication to be made by the clerk of the court in which the case is pending.⁶⁶

IV. VENUE

The venue provisions of the Texas Deceptive Trade Practices—Consumer Protection Act⁶⁷ continued to be the subject of judicial scrutiny during the survey period. In *Legal Security Life Insurance Co. v. Trevino*⁶⁸ the Texas Supreme Court resolved a conflict within the courts of civil appeals⁶⁹ as to the scope of the 1977 version of the Act that authorized suits in counties in which the defendant "has done business."⁷⁰ Adopting a broad view, the court held that "[a] defendant 'has done business' where

59. 600 S.W.2d at 346-47.

60. *Id.*

61. Tex. R. Civ. P. 106(e) (1978).

62. 590 S.W.2d at 569.

63. See Tex. R. Civ. P. 103 (1978).

64. See Pope & McConnico, *supra* note 1, at 485-86.

65. TEX. R. CIV. P. 103; see Pope & McConnico, *supra* note 1, at 486.

66. TEX. R. CIV. P. 103; see Pope & McConnico, *supra* note 1, at 486.

67. TEX. BUS. & COM. CODE ANN. § 17.56 (Vernon Supp. 1980-1981).

68. 605 S.W.2d 857 (Tex. 1980).

69. Compare *Legal Sec. Life Ins. Co. v. Trevino*, 594 S.W.2d 481 (Tex. Civ. App.—San Antonio 1979), *aff'd*, 605 S.W.2d 857 (Tex. 1980) with *Commercial Equip. Leasing Co. v. Steve's Oil Field Servs. Inc.*, 601 S.W.2d 462 (Tex. Civ. App.—Corpus Christi 1980, no writ); *Davis v. Aguila, Inc.*, 600 S.W.2d 367 (Tex. Civ. App.—Corpus Christi 1980, no writ); *Carter v. Suniland Furniture Co.*, 596 S.W.2d 596 (Tex. Civ. App.—Beaumont 1980, no writ); *Frost v. Molina*, 595 S.W.2d 184 (Tex. Civ. App.—Corpus Christi 1980, writ *dism'd*); and *Moore v. White*, 587 S.W.2d 549 (Tex. Civ. App.—Dallas 1979, no writ). See also Figari, *supra* note 31, at 421.

70. Tex. Gen. Laws 1977, ch. 216, § 8, at 604, *discussed in* Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 33 Sw. L.J. 455, 462-63 (1979). That provision of the Act was amended in 1979 to delete the "doing business" provision. Tex. Gen. Laws 1979, ch. 603, § 7, at 1332. See Figari, *supra* note 31, at 421.

the venue fact proved is the single transaction which is the basis of the suit."⁷¹ In *United Plastics Co. v. Dyes*⁷² the court further eased a plaintiff's burden by following a line of cases⁷³ that held that a plaintiff need not prove a cause of action under the Act to maintain venue, but merely allege one.⁷⁴

In contrast, the court in *Martin v. Commercial National Bank*⁷⁵ narrowly construed the language of subdivision 5(b) of article 1995.⁷⁶ Under that subdivision, a suit brought "upon or by reason of" a loan "intended primarily for personal, family, household or agricultural use" may be brought either in the county where the defendant resides or where the defendant signed the contract.⁷⁷ Although the original loan to the defendant in *Martin* was made for the purpose of purchasing goats, the court held that subdivision 5(b) was inapplicable because the note sued upon was a renewal note extending the original loan period.⁷⁸ According to the court, the purpose of the renewal note was "to extend the time for payment" and therefore the note was not a loan intended primarily for agricultural purposes.⁷⁹

Subdivision 31 of article 1995, which governs venue in "[s]uits for breach of warranty by a manufacturer of consumer goods,"⁸⁰ was also the subject of a narrow judicial construction during the survey period. The court in *Gorman-Rupp Corp. v. Kirk*⁸¹ held that an industrial water pump was not a "consumer good" within the meaning of the statute,⁸² and in so doing, rejected the reasoning of those courts that had interpreted the term more broadly.⁸³ Instead, the court relied upon "the rule requiring the venue statute to be strictly construed in favor of the defendant."⁸⁴

*Lubbock Manufacturing Co. v. Sames*⁸⁵ presented the novel question of

71. 605 S.W.2d at 857.

72. 588 S.W.2d 857 (Tex. Civ. App.—Tyler 1979, no writ).

73. See *Pettit v. England*, 583 S.W.2d 875 (Tex. Civ. App.—Dallas 1979, no writ); *Compu-Center, Inc. v. Compubill, Inc.*, 580 S.W.2d 88 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); *Dairyland County Mut. Ins. Co. v. Harrison*, 578 S.W.2d 186 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ), discussed in Figari, *supra* note 31, at 420-21.

74. 588 S.W.2d at 860. Although the court decided the case under the 1977 venue provisions, the subsequent amendments of the Act did not alter the language of the statute upon which the court relied in reaching its decision.

75. 598 S.W.2d 33 (Tex. Civ. App.—Austin 1980, no writ).

76. TEX. REV. CIV. STAT. ANN. art. 1995(5)(b) (Vernon Supp. 1980-1981).

77. *Id.*

78. *Id.*

79. 598 S.W.2d at 35. Accordingly, the court did not reach the question of whether the original loan for the purchase of goats was one intended for agricultural purposes. *Id.* n.1.

80. TEX. REV. CIV. STAT. ANN. art. 1995(31) (Vernon Supp. 1980-1981).

81. 601 S.W.2d 49 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

82. *Id.* at 51.

83. See *Trucker's Equip., Inc. v. Sandoval*, 569 S.W.2d 518 (Tex. Civ. App.—Corpus Christi 1978, no writ); *Maintenance & Equip. Contractors v. John Deere Co.*, 554 S.W.2d 28 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ dismissed). See Figari, *supra* note 31, at 422.

84. 601 S.W.2d at 51; accord, *Chavez v. Murrel's Welding Works*, 585 S.W.2d 787 (Tex. Civ. App.—San Antonio 1979, no writ); *L & M-Surco Mfg., Inc. v. Winn Tile Co.*, 580 S.W.2d 920 (Tex. Civ. App.—Tyler 1979, writ dismissed). The court in *Kirk*, however, made no attempt to articulate a comprehensive definition of "consumer goods."

85. 598 S.W.2d 234 (Tex. 1980); see Note, *Application of the Texas Venue Statute to Strict Liability in Tort: Lubbock Manufacturing Company v. Sames*, 34 Sw. L.J. 1004 (1980).

whether the sole fact that a fatal accident occurred in the county of suit is sufficient to maintain venue under subdivision 23 of article 1995⁸⁶ in a strict liability action against the manufacturer. The Texas Supreme Court analyzed the elements of a cause of action for strict liability in tort and found that physical harm to person or property was essential.⁸⁷ Thus, the court found that the cause of action arose in part in the county where the harm, *i.e.*, the accident, occurred within the meaning of subdivision 23, and ruled that venue was proper in that county.⁸⁸

Article 1995 contains two separate subdivisions dealing with the venue of suits against corporations: subdivision 23 governing suits against domestic corporations and subdivision 27 governing suits against foreign corporations.⁸⁹ During the survey period two courts of civil appeals considered cases in which foreign corporations argued that certificates of authority obtained pursuant to the Texas Business Corporation Act⁹⁰ conferred upon them domestic corporation status for venue purposes.⁹¹ In both instances the courts rejected the defendants' arguments and, in so doing, expressly disapproved the reasoning and result of a prior court of civil appeals decision.⁹²

The elements of proof necessary to establish venue in usury suits were clarified by the Texas Supreme Court in *Fitting Supply Co. v. Bell County Solar Control Corp.*⁹³ Resolving a conflict among the courts of civil appeals,⁹⁴ the court in *Fitting Supply* held that the venue provisions of the

86. TEX. REV. CIV. STAT. ANN. art. 1995(23) (Vernon 1964) provides for venue against a corporation in the county in which "the cause of action or part thereof arose."

87. 598 S.W.2d at 237. In reaching this result, the court relied upon the elements delineated by the *Restatement of Torts*. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). 598 S.W.2d at 236.

88. 598 S.W.2d at 237. The court distinguished the situation in which breach of a contract alone is sufficient to give rise to a cause of action for at least nominal damages, without the necessity to prove actual damages. *Id.* at 236-37; *see, e.g.*, *Stone Fort Nat'l Bank v. Forbess*, 126 Tex. 568, 91 S.W.2d 674 (1936).

89. TEX. REV. CIV. STAT. ANN. arts. 1996(23), (27) (Vernon 1964).

90. TEX. BUS. CORP. ACT ANN. art. 8.02 (Vernon 1980) provides that a foreign corporation that has obtained a certificate of authority "enjoy[s] the same, but no greater, rights and privileges as a domestic corporation."

91. *Sumitomo Corp. of America v. James K. Anderson, Inc.*, 599 S.W.2d 117 (Tex. Civ. App.—Dallas 1980, no writ); *Farmland Indus., Inc. v. Moore*, 596 S.W.2d 939 (Tex. Civ. App.—Waco 1980, no writ). The defendants' arguments in this regard were predicated on the fact that subdivision 27 authorizes a wider range of venue and imposes a lighter burden of proof on a plaintiff than does subdivision 23. *See generally* Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 29 Sw. L.J. 265, 268 (1975).

92. *Sumitomo Corp. of America v. James K. Anderson, Inc.*, 599 S.W.2d 117, 118 (Tex. Civ. App.—Dallas 1980, no writ); *see Burrows v. Texas Kenworth Co.*, 554 S.W.2d 300 (Tex. Civ. App.—Tyler 1977, writ dismissed). The court in *Sumitomo* distinguished the holding in *Burrows* from that in *J.I. Case Co. v. Darcy*, 424 S.W.2d 501 (Tex. Civ. App.—Amarillo 1968, writ dismissed), which had held that a foreign corporation that has obtained a certificate becomes a resident of Texas for purposes of venue determinations under TEX. REV. CIV. STAT. ANN. art. 1995(3) (Vernon 1964). 599 S.W.2d at 118.

93. 605 S.W.2d 856 (Tex. 1980).

94. *Compare Bell County Solar Control Corp. v. Fitting Supply Co.*, 593 S.W.2d 118 (Tex. Civ. App.—Waco 1979), *rev'd*, 605 S.W.2d 856 (Tex. 1980) with *Hugh Robinson Farm Mach., Inc. v. Wied*, 593 S.W.2d 731 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

usury statute⁹⁵ require a plaintiff to allege and prove not only that he resides in the county of suit, but also that he has a meritorious cause of action.⁹⁶

Venue of a suit brought against a national bank is governed by a federal statute requiring that such actions be brought in the county of the bank's domicile.⁹⁷ Exceptions to the statute do exist, however,⁹⁸ and two courts during the survey period construed those exceptions. In *Stephenson v. Walker*⁹⁹ the plaintiff brought suit against a national bank for the specific performance of a contract to convey Texas real estate. Attempting to overcome the bank's assertion of the statutory venue privilege, the plaintiff first argued that the action was local rather than transitory, and therefore was not within the terms of the statute. Although the court recognized that a purely local action is not subject to the statutory requirements,¹⁰⁰ it held that a suit for specific performance or damages arising out of a contract to convey realty is not of a purely local character.¹⁰¹ The court also rejected the plaintiff's second argument: that the bank had waived its venue privilege by seeking a protective order to limit the scope of a deposition after appearing specially pursuant to rule 120a.¹⁰² Noting that the motion for protective order was solely for the purpose of limiting the scope of the deposition to issues relevant to the venue objection, the court held that such conduct did not constitute the intentional relinquishment of the privilege necessary for waiver.¹⁰³

The plaintiff in *West v. City National Bank*¹⁰⁴ was more successful in establishing waiver. In *West* the national bank first filed a general denial in answer to the plaintiff's petition, then filed a special appearance pursuant to rule 120a,¹⁰⁵ and finally filed an amended special appearance and a motion to dismiss for improper venue. The court first noted that an at-

95. TEX. REV. CIV. STAT. ANN. art. 5069—1.06(3) (Vernon 1971).

96. 605 S.W.2d at 856. The plaintiff's failure to prove that usurious interest was paid therefore was fatal to his attempt to maintain venue in the county of his residence. *Id.*

97. 12 U.S.C. § 94 (1976). See generally *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963).

98. See, e.g., *Texas Commerce Bank Nat'l Ass'n v. Tripp*, 516 S.W.2d 256 (Tex. Civ. App.—Fort Worth 1974) (unlawful garnishment held waiver of privilege), *vacated as moot*, 18 Tex. Sup. Ct. J. 278 (Apr. 12, 1975), *discussed in* Figari, *supra* note 44, at 296. But see *First Nat'l Bank v. Stoutco, Inc.*, 530 S.W.2d 619 (Tex. Civ. App.—San Antonio 1975, writ *dism'd*) (intentional relinquishment of known right necessary to constitute waiver), *discussed in* Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 31 Sw. L.J. 373, 376 (1977).

99. 593 S.W.2d 846 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

100. *Id.* at 848; *accord*, *Houston Nat'l Bank v. Farris*, 549 S.W.2d 420 (Tex. Civ. App.—Waco 1977, writ *dism'd*), *discussed in* Figari, *supra* note 22, at 412; *South Padre Dev. Co. v. Texas Commerce Bank Nat'l Ass'n*, 538 S.W.2d 475 (Tex. Civ. App.—Corpus Christi 1976, no writ), *discussed in* Figari, *supra* note 98, at 376.

101. 593 S.W.2d at 849. In determining what is a local action, the court in *Stephenson* relied upon decisions interpreting the scope of TEX. REV. CIV. STAT. ANN. art. 1995(14) (Vernon 1964). 593 S.W.2d at 849.

102. TEX. R. CIV. P. 120a.

103. 593 S.W.2d at 849.

104. 597 S.W.2d 461 (Tex. Civ. App.—Beaumont 1980, no writ).

105. TEX. R. CIV. P. 120a.

tempt to assert the provisions of the National Bank Act¹⁰⁶ in a plea of privilege under rule 86¹⁰⁷ was improper, because the plea of privilege is proper only to transfer a case from one Texas county to another.¹⁰⁸ That issue aside, the court held that the bank's failure to file its special appearance before the general denial constituted a waiver of its venue privilege.¹⁰⁹

Section 2(g) of the Texas comparative negligence statute provides that "[a]ll claims for contribution between named defendants in the primary suit shall be determined in the primary suit."¹¹⁰ During the survey period two courts came to different conclusions concerning the meaning of "primary suit" where only one defendant successfully asserts a plea of privilege. In *Gonzales v. Blake*¹¹¹ only one of the three defendants in a suit brought in Harris County filed a plea of privilege to be sued in Hidalgo County; subsequently a cross-claim for contribution was filed by the other two defendants against him. Although the court found that the plea of privilege should have been sustained as to the original plaintiff's claims against that defendant, it nevertheless held that section 2(g)¹¹² requires that the cross-claims against him be determined in Harris County.¹¹³ The court reasoned:

Since in this case the claim for contribution . . . cannot be determined until the liability of [the cross-claimants] to answer in damages to the [plaintiff] has been determined, the primary suit must be considered to be the one in which such a judgment can be rendered. Therefore, the primary suit in this case is pending in Harris County, Texas.¹¹⁴

In *Blair v. Thomas*,¹¹⁵ however, the court concluded that there is no "primary suit" once the plea of privilege is sustained as to one defendant.¹¹⁶ According to the court:

He is then no longer a party to the original action against other defendants. . . . So far as he is concerned, the primary suit has been transferred to the county of his residence, and any third-party action against him by other defendants claiming contribution is subject to his right to have such action transferred to the county of his residence. . . .

. . . After such a severance, the posture of each action is the same as if only one defendant had been sued. In that situation, a third-party action for contribution is not a claim "for contribution between named defendants," and, consequently, venue of the third-party ac-

106. 12 U.S.C. § 94 (1976).

107. TEX. R. CIV. P. 86.

108. 597 S.W.2d at 464.

109. *Id.*

110. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1980-1981).

111. 605 S.W.2d 634 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

112. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1980-1981).

113. 605 S.W.2d at 638.

114. *Id.* at 637.

115. 604 S.W.2d 471 (Tex. Civ. App.—Dallas 1980, no writ).

116. *Id.* at 471.

tion is not governed by article 2212a.¹¹⁷

Venue of ancillary claims was also considered in *United Coin Meter Co. v. F.M. Short Co.*,¹¹⁸ a case addressing venue of counterclaims closely related to the claims asserted in the original suit.¹¹⁹ In *United Coin Meter* the plaintiff sued the defendant for repudiating a contract and the defendant successfully asserted a plea of privilege. The defendant then counterclaimed for breach of nine other contracts between the parties, whereupon the plaintiff filed a plea of privilege. Because each of the contracts were identical and the suit depended on construction of the contractual terms, the court held that the plaintiff's plea was properly denied.¹²⁰

Failure to allege a county of residence was held fatal to a defendant foreign corporation's plea of privilege in *O.F. Mossberg & Sons v. Sullivan*,¹²¹ under the rationale that the venue privilege extends only to those who qualify as inhabitants of Texas.¹²² The defendant in that case had specifically alleged that it had no agent, representative, or office in Texas. Because for venue purposes a foreign corporation is a resident of Texas only where it maintains an office and conducts business,¹²³ the court held that the plea of privilege failed to meet the rule 86¹²⁴ requirement that the plea specifically state the county of the defendant's residence.¹²⁵

Despite a defendant's proper assertion of a plea of privilege in due order of pleading, his subsequent conduct may result in a waiver of the plea.¹²⁶ In *Cope Construction Co. v. Power*¹²⁷ the court held that waiver occurred when the defendants, without reserving their venue rights, participated in a hearing on a motion to consolidate with another suit pending in the same county before the hearing on the plea of privilege was held.¹²⁸ In contrast, no waiver was found in *Perkola v. Koelling & Associates, Inc.*,¹²⁹ in which the defendants filed special exceptions after filing the plea of privilege, but did not present the exceptions for ruling before the plea of privilege hearing. The court in *Perkola* also rejected the plaintiff's argument that the defendants' participation in a temporary injunction hearing waived the plea of privilege, finding that the defendant's appearance at the hearing was only with respect to an ancillary matter,¹³⁰ and not an appearance in

117. *Id.* (citations omitted) (quoting *Southwestern Elec. Power Co. v. Martin Equip. Co.*, 593 S.W.2d 428, 429 (Tex. Civ. App.—Dallas 1980, no writ)).

118. 585 S.W.2d 914 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

119. See generally Figari, *supra* note 91, at 267-68.

120. 585 S.W.2d at 916. The fact that the defendant had the case transferred to his county of residence prior to filing the counterclaim was held to be irrelevant. *Id.*

121. 591 S.W.2d 952, 957 (Tex. Civ. App.—Austin 1979, no writ).

122. See 1 R. McDONALD, TEXAS CIVIL PRACTICE § 4.03.2 (rev. ed. 1965).

123. 591 S.W.2d at 955-56.

124. TEX. R. CIV. P. 86.

125. 591 S.W.2d at 957.

126. See Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 27 Sw. L.J. 182, 184-85 (1973).

127. 590 S.W.2d 721 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

128. *Id.* at 722-23.

129. 601 S.W.2d 110 (Tex. Civ. App.—Dallas 1980, writ dismissed).

130. In so finding, the court noted that the temporary injunction hearing did not resolve any issues of fact or law in the main suit. *Id.* at 112.

the main suit.¹³¹

V. PLEADINGS

Two significant changes were made in the Texas Rules of Civil Procedure to strengthen the power of the trial court to deal with violations of the pleading rules. Rule 70, as amended,¹³² enlarges the sanctions that may be imposed on a party who files a pleading that takes the opposite party by surprise.¹³³ The rule authorizes the trial court to assess the reasonable expenses of the surprised party, including attorneys' fees, that he might incur in the course of a resulting continuance, or to enter "such other order with respect thereto as may be just."¹³⁴ Amended rule 73¹³⁵ enlarges the sanctions that may be imposed upon a party failing to furnish a copy of his pleadings to the adverse party. The trial court is now authorized to strike all or part of the pleadings, to direct that the party not be permitted to present grounds contained in such pleadings, to require the party guilty of the failure to reimburse the adverse party for reasonable expenses, including attorneys' fees, incurred as a result of such failure, and to "make such order with respect to the failure as may be just."¹³⁶

Consistent with amendments to other rules making the date of the signing of a judgment the operative act,¹³⁷ rule 90¹³⁸ has been modified to require that defects in pleadings in a nonjury case be pointed out by written exception prior to the signing of the judgment in order to avoid waiver of objection. Furthermore, by deleting the words "motion or" in the former version of the rule, amended rule 90 suggests that defects in pleadings must be pointed out by exception and not by motion.

Four cases decided during the survey period considered the sufficiency of a denial of a sworn account under rule 185.¹³⁹ Rule 185 provides that a suit on sworn account "shall be taken as prima facie evidence thereof, unless the party resisting such claim shall . . . file a written denial, under oath, stating [1] that each and every item is not just or true, or [2] that some specified item or items are not just and true."¹⁴⁰ In *Crystal Investments v. Manges*¹⁴¹ the defendant filed a supplemental answer that stated: "Your Defendant denies that he owed the Plaintiff the sums sued upon in his

131. *Id.* The court further held that the defendant's attorney's agreement to accept service of process was not a waiver. *Id.*

132. TEX. R. CIV. P. 70.

133. Rule 70 previously authorized the court only to impose the cost of the term upon, and charge the continuance of the cause to, the party filing a pleading that takes the opposite party by surprise. TEX. R. CIV. P. 70 (1978).

134. TEX. R. CIV. P. 70.

135. TEX. R. CIV. P. 73. Rule 73 previously authorized a party not furnished with a copy of a pleading to secure a copy from the clerk and charge all costs therefor to the party who failed to deliver a copy to all adverse parties. *See* TEX. R. CIV. P. 73 (1978).

136. TEX. R. CIV. P. 73.

137. *See* notes 373-75 *infra* and accompanying text.

138. TEX. R. CIV. P. 90.

139. TEX. R. CIV. P. 185.

140. *Id.*

141. 596 S.W.2d 853 (Tex. 1980).

petition, or any part thereof, and that the said amount is not just and true in whole or in part"¹⁴² Focusing on this language, the supreme court held that, because the answer did not deny the validity of all items or any specific item contained in the sworn account, the answer was no more than a general denial and failed to satisfy the requirements of rule 185.¹⁴³ Similarly, in *Gayne v. Dual-Air, Inc.*¹⁴⁴ the court of civil appeals held that the defendant failed to satisfy rule 185 because his verification of the denials contained in his answer was made "to the best of his knowledge."¹⁴⁵ Reiterating the rule that courts should be "extremely exacting in the nature of the language used in sworn denials of such accounts,"¹⁴⁶ the court held that the language "best of his knowledge" was equivocal and inadequate to satisfy rule 185.¹⁴⁷

A more liberal view of the requirements of rule 185 is found in *Hill v. Floating Decks of America, Inc.*,¹⁴⁸ where the court held that the defendant's answer, which recited that "each and every item in Plaintiff's petition which is the foundation of Plaintiff's action is not just or true," was in compliance with rule 185.¹⁴⁹ In so finding, the court rejected the arguments that it was defective because it failed to recite that the denial was upon personal knowledge and that it included the words "in Plaintiff's petition which is the foundation of Plaintiff's action,"¹⁵⁰ language that is not called for in rule 185.¹⁵¹

The advisability of using terms of ordinary meaning to allege the existence of a sworn account was pointed out in *Coon v. Pettijohn & Pettijohn Plumbing, Inc.*,¹⁵² wherein the plaintiff's technical description of the account resulted in a reversal of his judgment. The plaintiff, a plumbing contractor, alleged monies due on specific dates for a "Bid," for an "Amount due rough in," and for an "Amount due top out."¹⁵³ The court held that the descriptions of the items furnished on account did not satisfy the requirements of rule 185, because they did not describe with reasonable certainty the nature of the items making up the account.¹⁵⁴ While the court observed that the descriptions might have meaning to the parties or

142. *Id.* at 854.

143. *Id.*

144. 600 S.W.2d 373 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

145. *Id.* at 374-75.

146. *Id.* at 375 (quoting *Solar v. Petersson*, 481 S.W.2d 212, 215 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ)).

147. 600 S.W.2d at 375. In reaching this conclusion, the court distinguished the language "within my knowledge" and approved of its use as being an acceptable variation of the language of the rule itself. *Id.*

148. 590 S.W.2d 723 (Tex. Civ. App.—San Antonio 1979, no writ).

149. *Id.* at 724, 729.

150. *Id.*

151. The more liberal approach of the court in *Hill* must be viewed with some caution by the trial practitioner, as it is somewhat inconsistent with other decisions. *See, e.g.*, *Crystal Invs. v. Manges*, 596 S.W.2d 853 (Tex. 1980); *Duncan v. Butterowe*, 474 S.W.2d 619 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

152. 587 S.W.2d 551 (Tex. Civ. App.—Fort Worth 1979, no writ).

153. *Id.* at 552.

154. *Id.*

to the plumbing trade, it nevertheless held them to be legally insufficient because their meaning could not be determined without additional evidence.¹⁵⁵

VI. LIMITATIONS

Article 5539c¹⁵⁶ extends the limitations period up to an additional thirty days beyond the answer date on a counterclaim or crossclaim that would otherwise be barred by the applicable statute of limitations, provided that such claim arises out of the same transaction or occurrence upon which the plaintiff's suit is based. In *North American Land Corp. v. Boutte*¹⁵⁷ the court applied article 5539c to allow the assertion of a counterclaim that the defendant previously had filed as a plaintiff in a separate lawsuit that was dismissed for want of prosecution.¹⁵⁸ In reaching its holding, the court distinguished *Hobbs Trailers v. J.T. Arnett Grain Co.*,¹⁵⁹ in which the supreme court refused to accord the saving effect of article 5539c to the claims of a plaintiff who became a nominal defendant through a realignment of the parties.¹⁶⁰

During the survey period a decision of significance to practitioners was handed down in *Garcia v. Texas Instruments, Inc.*¹⁶¹ The plaintiff in *Garcia* had been injured during the course of his employment by a product his employer had purchased from the manufacturer; however, he failed to file suit against the manufacturer until over three years later. By framing his cause of action as a suit for breach of an implied warranty, the plaintiff sought to avoid the two-year limitations period applicable to personal injury suits.¹⁶² Arguing in the alternative that he was a third-party beneficiary of the contract between the manufacturer and his employer, the plaintiff contended that the four-year contract limitations period specified in the Texas Uniform Commercial Code¹⁶³ was applicable. Rejecting this argument, the court of civil appeals refused to apply the four-year statute, primarily due to the lack of any contractual relationship between the plaintiff and the manufacturer.¹⁶⁴ Reversing the court of civil appeals, the

155. *Id.*

156. TEX. REV. CIV. STAT. ANN. art. 5539c (Vernon Supp. 1980-1981). The statute was intended to change the result in cases such as *Morris-Buick Co. v. Davis*, 127 Tex. 41, 91 S.W.2d 313 (1936). See generally McElhaney, *Texas Civil Procedure, Annual Survey of Texas Law*, 24 Sw. L.J. 179, 192 (1970).

157. 604 S.W.2d 245 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

158. *Id.* at 247.

159. 560 S.W.2d 85 (Tex. 1977).

160. *Id.* at 88-89; see Figari, *supra* note 70, at 466.

161. 610 S.W.2d 456 (Tex. 1980).

162. TEX. REV. CIV. STAT. ANN. art. 5526(4) (Vernon Supp. 1980-1981).

163. TEX. BUS. & COM. CODE ANN. § 2.725(a) (Vernon 1968).

164. 598 S.W.2d 24, 30 (Tex. Civ. App.—Dallas 1980). The court dismissed the plaintiff's claim to third-party beneficiary status with the observation that "there is no indication that the parties intended to benefit appellant by the contract," *id.* at 29 n.5, and further held that even one in privity of contract could recover "only on the basis of a 'warranty' in the commercial sales sense." *Id.* at 29 (quoting *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412, 425 (1973)).

supreme court concluded that the four-year statute¹⁶⁵ governs a claim against a manufacturer for personal injuries resulting from a defective product when the claim is pleaded as a breach of an implied warranty.¹⁶⁶ In so holding, the supreme court found that privity of contract between an injured party and the manufacturer is not required.¹⁶⁷

The enforceability of a contractual limitation period was the subject of *Port Arthur Towing Co. v. Mission Ins. Co.*,¹⁶⁸ a federal diversity action governed by Texas law. At issue was an insurance policy clause that established a limitations period of twelve months or, alternatively, if the twelve-month period was invalid under state law, fixed the limitations period at "the shortest limit of time permitted by the laws of such state."¹⁶⁹ Conceding that the twelve-month period was void under article 5545,¹⁷⁰ the defendant claimed that the alternative provision established a permissible contractual limitation of two years, which was allowed by article 5545.¹⁷¹ Recognizing that the precise issue had not been resolved in Texas, the court, citing *American Surety Co. v. Blaine*,¹⁷² held that the clause properly established the two-year limitations period that article 5545 permits.¹⁷³

VII. PARTIES

In *Ferguson v. McCarrell*¹⁷⁴ the supreme court resolved a conflict among the courts of civil appeals¹⁷⁵ as to the propriety of a suit against a guarantor in which the maker of the note is not a party. In *Ferguson* the trial court granted the plaintiff's motion for severance of its claims against the maker of the note and then proceeded to trial solely against the guarantors. The trial resulted in a judgment being entered against the guarantors, and the guarantors appealed. Rejecting the guarantors' objections that the judgment rendered against them violated articles 1986¹⁷⁶ and 2088,¹⁷⁷ the court of civil appeals held that the specific written contracts under which the guarantors had agreed to endorse and guarantee the payment of the note imposed upon them the status of primary obligors.¹⁷⁸ Thus, the court ruled that the guarantors could be sued directly without the necessity of

165. TEX. BUS. & COM. CODE ANN. § 2.725(a) (Vernon 1968).

166. 610 S.W.2d at 462.

167. *Id.* at 465. In support of this conclusion, the supreme court cited its holding in *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969), which extended the doctrine of strict liability to innocent bystanders. *Id.* at 464. The issue of the plaintiff's third-party beneficiary status was ignored by the court.

168. 623 F.2d 367 (5th Cir. 1980).

169. *Id.* at 368.

170. TEX. REV. CIV. STAT. ANN. art. 5545 (Vernon 1958).

171. *Id.*

172. 272 S.W. 828 (Tex. Civ. App.—Texarkana 1925, writ ref'd n.r.e.).

173. 623 F.2d at 370.

174. 588 S.W.2d 895 (Tex. 1979) (per curiam).

175. Compare *Ferguson v. McCarrell*, 582 S.W.2d 539 (Tex. Civ. App.—Austin), writ ref'd n.r.e. per curiam, 588 S.W.2d 895 (Tex. 1979) with *Cook v. Citizens Nat'l Bank*, 538 S.W.2d 460 (Tex. Civ. App.—Beaumont 1976, no writ).

176. TEX. REV. CIV. STAT. ANN. art. 1986 (Vernon 1964).

177. *Id.* art. 2088.

178. 582 S.W.2d at 541.

joining the original maker of the note.¹⁷⁹ In refusing to grant the application for writ of error, the supreme court found that the case was governed by section 3.416(a) of the Texas Business and Commerce Code,¹⁸⁰ and expressly disapproved a contrary holding in *Cook v. Citizens National Bank*.¹⁸¹

Underscoring the effect of the 1977 amendments to rule 42,¹⁸² the court in *Zauber v. Murray Savings Association*¹⁸³ held that a shareholder-plaintiff bringing a derivative action against a corporation was not required to satisfy the prerequisites of rule 42,¹⁸⁴ rather, a plaintiff in a derivative suit need satisfy only the requirements of article 5.14(B) of the Texas Business Corporation Act.¹⁸⁵

VIII. DISCOVERY

The most significant developments in the area of discovery were the changes to the Texas Rules of Civil Procedure, effective January 1, 1981.¹⁸⁶ Rule 167,¹⁸⁷ governing production of documents and things, was completely rewritten and revised in several significant respects. First, the procedural mechanism for obtaining production was conformed to that of rule 34 of the Federal Rules of Civil Procedure.¹⁸⁸ As a result, a showing of good cause by the requesting party need no longer be made, and a prior hearing or court order is no longer necessary to enable a party to obtain such discovery from another party.¹⁸⁹ A response to rule 167 discovery now must be served in writing¹⁹⁰ within thirty days of receipt of the requests,¹⁹¹ either stating that the requests will be granted or objecting thereto. Any objection must state the specific reasons for the objection.¹⁹² A hearing is required only upon request,¹⁹³ which may be made either by a requesting party unsatisfied with a response, or by a responding party ob-

179. *Id.* at 542.

180. TEX. BUS. & COM. CODE ANN. § 3.416(a) (Vernon 1968).

181. 583 S.W.2d 460 (Tex. Civ. App.—Beaumont 1976, no writ), *discussed in* Figari, *supra* note 98, at 380. 583 S.W.2d at 895.

182. Prior to the 1977 amendments, rule 42 applied to derivative suits. Tex. R. Civ. P. 42 (1975); *see* Figari, *supra* note 91, at 272. As amended in 1977, however, rule 42 is no longer applicable to derivative suits.

183. 591 S.W.2d 932 (Tex. Civ. App.—Dallas 1979), *writ ref'd n.r.e. per curiam*, 601 S.W.2d 940 (Tex. 1980), *discussed in* Folladori, *Corporations and Partnerships*, p. 234 *supra*.

184. 591 S.W.2d at 935; TEX. R. CIV. P. 42.

185. 591 S.W.2d at 935-36; TEX. BUS. CORP. ACT ANN. art. 5.14(B) (Vernon 1980).

186. TEX. R. CIV. P. 167-168, 201; *see* Hagerman, *Highlights of Changes in the 1981 Civil Trial Rules*, 43 TEX. B.J. 991 (1980); Pope & McConnico, *supra* note 1, at 457-84.

187. TEX. R. CIV. P. 167.

188. FED. R. CIV. P. 34(b).

189. *Cf.* Tex. R. Civ. P. 167 (1978) (requiring a court order, upon motion showing good cause). Under the amended rule, the request may not be served until a party has filed a pleading or the time therefor has elapsed. TEX. R. CIV. P. 167(2). The request must specify a reasonable time, place, and manner for production. TEX. R. CIV. P. 167(1)(c).

190. TEX. R. CIV. P. 167(1)(d).

191. TEX. R. CIV. P. 167(2). This time period may be lengthened or shortened upon a showing of good cause. *Id.*

192. TEX. R. CIV. P. 167(1)(d).

193. TEX. R. CIV. P. 167(3).

jecting to a request.¹⁹⁴

Secondly, the scope of rule 167 has now been explicitly broadened, both as to the type of production that may be sought and the persons from whom discovery may be sought.¹⁹⁵ A party may now obtain testing or sampling of tangible things;¹⁹⁶ may request recordings and data compilations, translated if necessary by the responding party into reasonably usable form;¹⁹⁷ and may obtain production of documents as they are kept in the ordinary course of business, or organized and labeled by category in the request.¹⁹⁸ A party may also obtain production from a nonparty¹⁹⁹ upon a court order issued after motion, notice to all parties and the nonparty, and a hearing at which objections by any of those required to be notified may be raised.²⁰⁰ Unlike discovery from parties, however, a showing of "necessity" must be made by the party seeking such discovery from a nonparty.²⁰¹

The new version of the rule also permits broader discovery from expert witnesses.²⁰² A party "for good cause" shown, upon motion and hearing, may now obtain a court order requiring the expert to reduce discoverable factual observations, data, or opinions to written form for production.²⁰³ Additionally, the rule broadens the discovery obligations of a party alleging physical or mental injury by requiring him, upon request, to furnish an authorization for the release of medical records reasonably related to the injury.²⁰⁴ Rule 167 also gives broad scope to the discovery obligations of

194. *Id.* In addition, the rule is explicitly made subject to the provisions of TEX. R. CIV. P. 186b, permitting protective orders. TEX. R. CIV. P. 167.

195. Nevertheless, the rule is expressly subject to the general provisions of TEX. R. CIV. P. 186a governing the scope of discovery. TEX. R. CIV. P. 167. Thus, while rule 167 as amended does not contain the privilege previously set forth in the third paragraph of the old rule concerning statements of witnesses and intra-party communications, this privilege is still contained in rule 186a, which is incorporated by reference into amended rule 167. *Id.*

196. TEX. R. CIV. P. 167(1)(a). Such testing may not, however, extend to destruction or material alteration of the item without notice, hearing, and prior court approval. TEX. R. CIV. P. 167(1)(g).

197. TEX. R. CIV. P. 167(1)(a). This provision extends the items that may be sought to include computer records. Further, it recognizes that such materials may be unintelligible unless the person possessing such information deciphers them. A similar recognition is contained in FED. R. CIV. P. 34(a)(1).

198. TEX. R. CIV. P. 167(1)(f). The amended federal rule governing production includes a similar provision. FED. R. CIV. P. 34(b). See generally Guittard & Tyler, *1980 Amendments to the Federal Rules of Civil Procedure*, 32 BAYLOR L. REV. 533 (1980).

199. TEX. R. CIV. P. 167(4). The old rule did not address this issue, and various court decisions were in conflict with respect to discovery from nonparties. Compare *Neville v. Brewster*, 352 S.W.2d 449 (Tex. 1961) with *Hopkins v. Hopkins*, 540 S.W.2d 783 (Tex. Civ. App.—Corpus Christi 1976, no writ).

200. TEX. R. CIV. P. 167(4).

201. *Id.*

202. Experts engaged solely for consultation are, however, not affected, because the provisions of the rule are directed strictly to expert "witnesses." TEX. R. CIV. P. 167(5).

203. *Id.* Under the old rule a party could discover only then existing reports. See Tex. R. CIV. P. 167 (1978).

204. TEX. R. CIV. P. 167(7). Once a party has obtained such records, however, the rule requires that they be furnished without charge to all other parties at least 14 days prior to trial. *Id.* Dissemination except for use in the pending case is forbidden. *Id.*

An excellent illustration of the purpose underlying the provision is contained in *Martinez*

all responding parties by defining "possession, custody or control" so as to include a respondent's right to compel production of or entrance from a third person, including an agency, authority, or representative.²⁰⁵

Thirdly, amended rule 167 explicitly extends a court's power to impose monetary sanctions for abuse of the discovery process.²⁰⁶ Unlike prior practice,²⁰⁷ the court may now impose sanctions not only for failure to comply with court ordered production but also for "unreasonably frivolous" responses or responses "made for the purpose of delay."²⁰⁸ Thus, sanctions are now available both to secure discovery and to punish a party.²⁰⁹ Further, such sanctions are for the first time extended to apply to the party requesting discovery²¹⁰ when such requests are "not within the scope" of rule 167 or are "unreasonably frivolous."²¹¹

Rule 168,²¹² governing interrogatories to parties, was also extensively revised by the 1981 amendments. The scope of the interrogatories and the responses thereto were significantly changed.²¹³ The rule also limits the number of interrogatories that may be served at any one time upon any one party; a party may not submit interrogatories requiring more than thirty answers.²¹⁴ Further, the rule restricts to two the number of sets of such interrogatories that may be served on any one party.²¹⁵ The number or sets of interrogatories that may be served may be increased only by agreement of the parties or by a court order entered after hearing upon a

v. Rutledge, 592 S.W.2d 398 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). In that case the party seeking discovery of the plaintiff's medical records from a hospital was refused them because the plaintiff had not given the necessary authorization. The requesting party was then forced to seek an order compelling the plaintiff to grant the authorization. Upon the plaintiff's refusal, the trial court dismissed the suit and, on appeal, the court of civil appeals affirmed, holding that a plaintiff putting his health at issue has no privilege as to medical records and that the records were within his control in that he had the right to require their release. *Id.* at 400-01. Although the *Martinez* decision is in accordance with amended rule 167, the rule provides a simpler and surer procedure for reaching the same result.

205. TEX. R. CIV. P. 167(8).

206. TEX. R. CIV. P. 167(3). More specifically, the court may tax the costs of a hearing necessitated by such conduct, including reasonable attorneys' fees, against the offending party. *Id.*

207. Under the former rules, sanctions were available only if a party refused to obey a court order. Tex. R. Civ. P. 167, 170, 215a (1978). The sanctions of rule 170, which was not amended, are still available for refusal to obey a court order under rule 167.

208. TEX. R. CIV. P. 167(3). The rule does not, however, explicitly address the issue of whether and what sanctions may be applied for failure to respond altogether.

209. See Pope & McConnico, *supra* note 1, at 465 n.24.

210. TEX. R. CIV. P. 167(3). Rule 170, formerly the only rule governing sanctions under rule 167, refers only to a party's refusal to make discovery. TEX. R. CIV. P. 170.

211. TEX. R. CIV. P. 167(3).

212. TEX. R. CIV. P. 168.

213. Like amended rule 167, however, amended rule 168 is explicitly subject to the general scope of discovery set forth in rule 186a. TEX. R. CIV. P. 168(2).

214. TEX. R. CIV. P. 168(5). This new provision undoubtedly will be subject to future judicial construction, because it is unclear when a question requires more than one "answer." For example, a question exists whether an interrogatory requesting a party to "identify" a person (defined so as to include name, address, and telephone number) requires one or three answers.

215. *Id.*

showing of good cause.²¹⁶

In cases where information sought is contained in public records, the rule now permits a party to respond by identifying those records.²¹⁷ The rule retains the prior provision permitting a similar response when the information sought was contained in the business records of the respondent.²¹⁸ With regard to both business and public records, however, the rule limits such "identification" responses by requiring the respondent to "include sufficient detail to permit the interrogating party to readily identify the individual documents from which the answers may be ascertained."²¹⁹

Various changes in response procedures were also effected by the amendments. A party serving interrogatories need no longer provide a space for each answer;²²⁰ rather, the respondent must now begin each answer with the question to which it pertains.²²¹ Additionally, the respondent must now verify the answers, as well as sign them.²²² Finally, service of interrogatories and responses is now required to be made on all parties.²²³

More significantly, the rule now permits objections to be served at the same time as answers,²²⁴ thus eliminating the prior requirement that objections be filed fifteen days after the filing of interrogatories.²²⁵ Moreover, for the first time the rule expressly addresses the duty to supplement responses with respect to the identity and subject matter of expert witness testimony.²²⁶ A party expecting to call an expert witness must supplement by providing the name, address, and telephone number of the expert as well as the substance of his testimony.²²⁷ The information must be provided as soon as is practical, but in no event less than fourteen days before trial begins.²²⁸ When such a supplemental response is not "timely made," the testimony must be excluded.²²⁹

216. *Id.*

217. TEX. R. CIV. P. 168(2)(a).

218. TEX. R. CIV. P. 168(2)(b).

219. TEX. R. CIV. P. 168(2). The federal rule governing interrogatories has also been amended to include such a provision. FED. R. CIV. P. 33(c).

220. *See* TEX. R. CIV. P. 168 (1978).

221. TEX. R. CIV. P. 168(5).

222. *Id.* TEX. R. CIV. P. 14, permitting an agent or attorney to make an affidavit on behalf of a party, is expressly made inapplicable to this requirement. *Id.*

223. TEX. R. CIV. P. 168(5). Previously, no more than four copies were required, whatever the number of adverse parties. TEX. R. CIV. P. 168 (1978).

224. TEX. R. CIV. P. 168(6).

225. *See* TEX. R. CIV. P. 168 (1978).

226. TEX. R. CIV. P. 168(7)(a)(3). The former version of the rule, containing a general duty to supplement answers that later became incorrect, was held applicable to information about expert witnesses. TEX. R. CIV. P. 168 (1978); *see Meyerland Co. v. Palais Royal, Inc.*, 557 S.W.2d 534, 537-38 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). The amended rule retains the general duty to supplement but adds to it a provision requiring such supplementation to be made not less than 14 days prior to trial. TEX. R. CIV. P. 168(7)(a)(1)-(2).

227. TEX. R. CIV. P. 168(7)(a)(3).

228. *Id.*

229. *Id.* The court has discretion, however, to permit the admission of such testimony if "good cause sufficient to require its admission exists." *Id.* The 14-day limitation is appar-

Paralleling the new sanctions permitted under rule 167,²³⁰ amended rule 168²³¹ permits the court to impose monetary sanctions²³² against either a requesting party serving unreasonable, frivolous, or harassing interrogatories or a respondent filing unreasonable, frivolous, or delaying objections.²³³ In addition, monetary sanctions are also permitted against a respondent who fails to make a good faith effort to answer the interrogatories.²³⁴ Moreover, the rule goes beyond rule 167 by permitting a court that finds a party to be "abusing the discovery process in seeking, making or resisting discovery under [rule 168]"²³⁵ to impose the sanctions provided in rules 170 and 215a.²³⁶

Although the scope of and procedure for taking depositions was not altered by the 1981 amendments, changes were made in the rule governing compelled appearance at depositions.²³⁷ As amended, rule 201 has simplified the process of issuing and serving subpoenas by permitting court clerks and certified reporters,²³⁸ as well as those persons authorized by statute to take a deposition, to cause a subpoena to be issued and served.²³⁹ Adhering to the broader scope of production permissible under rule 167,²⁴⁰ rule 201 now includes among the items that may be required by a subpoena duces tecum "recordings and other data compilations . . . translated, if necessary, by the Respondent . . . into reasonably usable form."²⁴¹ In addition, rule 201 was amended to permit service upon a party's attorney²⁴² where the witness to be deposed is an agent or employee of a party.²⁴³

ently a minimum requirement; thus, a supplementation that meets the test may still be untimely, and therefore excludable, in some circumstances.

230. TEX. R. CIV. P. 167(3); see notes 206-11 *supra* and accompanying text.

231. TEX. R. CIV. P. 168(6).

232. *Id.* These include the costs of a hearing and reasonable attorneys' fees necessitated by the offending party's actions. *Id.*

233. *Id.* The rule now makes clear that answers to interrogatories to which objections are made are not due until the objections are ruled upon "and for such additional time thereafter as the court may direct." *Id.*

234. *Id.*

235. TEX. R. CIV. P. 168(8).

236. *Id.*; see TEX. R. CIV. P. 170, 215a. The prior version of rule 168 permitted the sanctions of rule 215a to be applied without the issuance of a prior order to compel and a refusal when no answers whatsoever were served; when a party refused to answer some, but not all, of the interrogatories, such sanctions were appropriate only after an order to compel was obtained and disobeyed. TEX. R. CIV. P. 168 (1978); see *Lewis v. Illinois Employers Ins. Co.*, 590 S.W.2d 119 (Tex. 1979). The amended rule does not expressly draw this distinction in specifying the type of conduct justifying the sanctions of rules 170 or 215a.

237. TEX. R. CIV. P. 201.

238. TEX. R. CIV. P. 201(1); see TEX. REV. CIV. STAT. ANN. art. 2324b (Vernon Supp. 1980-1981).

239. Formerly, only those persons specified in TEX. REV. CIV. STAT. ANN. art. 2324a (Vernon 1971) (official district court reporter), and *id.* art. 3746 (Vernon Supp. 1980-1981) (officers authorized to execute) could perform this function. TEX. R. CIV. P. 201 (1978).

240. TEX. R. CIV. P. 167(1)(a); see notes 195-200 *supra* and accompanying text.

241. TEX. R. CIV. P. 201(2).

242. TEX. R. CIV. P. 201(3). Thus, a subpoena is no longer necessary to require attendance of an agent or employee of a party. Further, such a person may be required to produce at the deposition the items specified in § 2 of the rule by designation in the notice. *Id.*

243. *Id.* Such a person must also "be subject to the control of [the] party." *Id.*

Several court decisions during the survey period addressed the procedures for taking and using depositions. In *Burr v. Shannon*²⁴⁴ the Texas Supreme Court considered the permissible procedure for taking and recording a deposition by nonstenographic means.²⁴⁵ The plaintiff in *Burr* sought a mandamus ordering the trial court to permit her attorney to depose the defendant by tape recorder and to have the recording reduced to writing by his secretary, a notary public. The court first noted that a written record of a nonstenographic deposition is required by the rule, unless excused by the court.²⁴⁶ The court then held that under a statutory exception,²⁴⁷ a noncertified person may make the required written record.²⁴⁸ The court also held, however, that in such a case a protective order²⁴⁹ should be entered by the court to protect the parties and the deponent.²⁵⁰

In *Baylor University Medical Center v. Travelers Insurance Co.*²⁵¹ the court upheld the admission of testimony from a filed but unsigned deposition.²⁵² Concluding that an objection to a lack of signature goes to the form of a deposition,²⁵³ the court based its holding upon rule 212,²⁵⁴ which bars such objections unless served in writing upon opposing counsel prior to trial.

IX. DISMISSAL

Rule 164²⁵⁵ provides that a plaintiff may take a nonsuit at any time "before plaintiff has rested his case, *i.e.*, has introduced all his evidence other than rebuttal evidence"²⁵⁶ In *O'Brien v. Stanzel*,²⁵⁷ a probate action involving proponents of two different wills, the intervenors²⁵⁸ moved for a nonsuit after both sets of proponents had rested their cases, and after a motion for an instructed verdict had been made against the intervenors' case. The trial court granted the nonsuit and dismissed the claims of the intervenors without prejudice, and the court of civil appeals reversed.²⁵⁹ Defending the action of the trial court, the intervenors argued on appeal to the supreme court that the trial court had discretion to grant a

244. 593 S.W.2d 677 (Tex. 1980).

245. See TEX. R. CIV. P. 215c.

246. 593 S.W.2d at 677 (quoting TEX. R. CIV. P. 215c(e)).

247. TEX. REV. CIV. STAT. ANN. art. 2324b, § 15 (Vernon Supp. 1980-1981). That exception makes the requirement of a certified reporter inapplicable "to a party to the litigation, his attorney, or to a fulltime employee of either." *Id.*

248. 593 S.W.2d at 678.

249. See TEX. R. CIV. P. 186b.

250. 593 S.W.2d at 678.

251. 587 S.W.2d 501 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

252. *Id.* at 506.

253. *Id.* (citing *Bankers Multiple Line Ins. Co. v. Gordon*, 422 S.W.2d 244 (Tex. Civ. App.—Houston [1st Dist.] 1967, no writ)).

254. TEX. R. CIV. P. 212.

255. TEX. R. CIV. P. 164.

256. *Id.*

257. 603 S.W.2d 826 (Tex. 1980).

258. The intervenors were proponents of an earlier, allegedly lost will and, as such, were also plaintiffs within the meaning of rule 164.

259. 603 S.W.2d at 826.

nonsuit even after the right to a nonsuit under rule 164 has expired. Acknowledging that "circumstances may arise which, in a court's discretion, constitutes [*sic*] grounds for a nonsuit late in a trial," the supreme court found no such circumstances on the facts of the case.²⁶⁰ In so holding, the supreme court emphasized that special circumstances must be present before a court may properly grant a nonsuit not authorized by rule 164.²⁶¹

In *Extended Services Program, Inc. v. First Extended Service Corp.*²⁶² the plaintiff had moved the trial court for a nonsuit after a hearing but before a decision on the defendant's motion for summary judgment. Reviewing the denial of the request for a nonsuit, the court of civil appeals held that a nonsuit should have been granted, finding that a summary judgment proceeding is not a trial for purposes of rule 164.²⁶³

X. DISQUALIFICATION OF TRIAL JUDGE

Until recently, the procedure to be followed in seeking disqualification of a trial judge was uncertain. Rule 18a,²⁶⁴ which was added by the 1981 amendments to the Texas Rules of Civil Procedure, has eliminated a major portion of this uncertainty and establishes a clear and definite procedure for seeking disqualification.²⁶⁵ Pursuant to the new rule, a motion for disqualification must be filed a minimum of ten days prior to the trial date or other district court hearing.²⁶⁶ Grounds for the motion "may include any disability of the judge to sit in the case."²⁶⁷ Copies of the motion must be served on all other parties or counsel on the date that the motion is filed, "together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise or-

260. *Id.* at 828.

261. *Id.* The court, in a dictum, observed that the intervenors made no claim that another trial would allow them to produce other evidence, thus implying that such a demonstration would be necessary to justify granting a nonsuit after a plaintiff rests his case. *Id.*

262. 601 S.W.2d 469 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

263. *Id.* at 471-72. The court, however, did approve the holding in *Collins v. Waldo*, 291 S.W.2d 360 (Tex. Civ. App.—Eastland 1956, no writ), in which the court refused to grant a motion for a nonsuit that was made after the trial court announced that it would grant the defendant's motion for summary judgment but before the entry of the judgment. *See also* note 298 *infra* and accompanying text.

264. TEX. R. CIV. P. 18a; *see* Pope & McConnico, *supra* note 1, at 490.

265. Prior to the advent of rule 18a, the only rule addressing procedures for disqualification was TEX. R. CIV. P. 528, which applies to proceedings in the justice courts. A statute did, however, provide limited guidance with respect to the procedure for disqualification of a trial judge in the district court. *See* TEX. REV. CIV. STAT. ANN. art. 200a, § 6 (Vernon Supp. 1980-1981) (a district judge is required to request the presiding judge of the administrative district to assign another judge to hear a motion to recuse). *See generally* McLeod v. Harris, 582 S.W.2d 772 (Tex. 1979).

266. TEX. R. CIV. P. 18a(a).

267. *Id.* The Texas Constitution provides that "[n]o judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case." TEX. CONST. art. V, § 11. Statutes that specify grounds for disqualification include TEX. REV. CIV. STAT. ANN. art. 15 (Vernon 1969); *id.* art. 2378 (Vernon 1971); and TEX. CODE CRIM. PROC. ANN. art. 30.01 (Vernon 1966). *See also* State Bar of Texas, Rules and Code of Judicial Conduct, Canon No. 3(C), TEX. REV. CIV. STAT. ANN. tit. 14 app. (Vernon Supp. 1980-1981).

dered by the judge."²⁶⁸

After the motion to disqualify is filed and served, two alternative courses of action are available to the trial judge. He must either recuse himself²⁶⁹ or request the presiding judge of the administrative judicial district to assign a judge to hear the motion.²⁷⁰ If the judge declines to recuse himself, he is required to forward to the presiding judge of the administrative judicial district an order of referral, the motion, and all opposing and concurring statements.²⁷¹ "Except for good cause stated in the order in which further action is taken," the trial judge can take no further action "after filing of the motion and prior to a hearing on the motion."²⁷² The presiding judge to whom the motion is referred is required immediately to set a hearing on the motion before himself or another designated judge and is authorized to enter "orders including orders on interim or ancillary relief in the pending cause as justice may require."²⁷³

Rule 18a also contains a provision governing the appeal from a ruling on a motion to disqualify.²⁷⁴ If the motion is denied, the lower court's action is reviewable for "abuse of discretion on appeal from the final judgment."²⁷⁵ If the motion is granted, the order is not reviewable, and the presiding judge must assign another judge to hear the case.²⁷⁶ Although decided before the enactment of rule 18a, *Society of Separationists, Inc. v. Strobel*²⁷⁷ held that a party seeking a recusal of the trial judge may assert as error the denial of his motion to disqualify on appeal from a final judgment, irrespective of the party's earlier failure to seek review of the matter by a writ of mandamus.²⁷⁸

XI. SUMMARY JUDGMENT

The failure of a party to respond to a motion for summary judgment and its effect on the scope of appellate review were the subject of a number of decisions during the survey period. As noted in last year's *Survey*,²⁷⁹ the leading decision in this area is the supreme court's opinion in *City of Houston v. Clear Creek Basin Authority*.²⁸⁰ Relying on *Clear Creek*, the

268. TEX. R. CIV. P. 18a(b). Any other party may file an opposing or concurring statement at any time before the motion is heard. *Id.*

269. TEX. R. CIV. P. 18a(c). If the trial judge recuses himself, he "shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken." *Id.*

270. *Id.*

271. TEX. R. CIV. P. 18a(d).

272. *Id.*

273. *Id.*

274. TEX. R. CIV. P. 18a(e).

275. *Id.*

276. *Id.*

277. 593 S.W.2d 855 (Tex. Civ. App.—Austin 1980, no writ).

278. *Id.* at 857.

279. See Figari, *supra* note 31, at 434-36.

280. 589 S.W.2d 671 (Tex. 1979). For a good discussion of summary judgment practice and the *Clear Creek* decision, see Hittner, *Summary Judgments in Texas*, 43 TEX. B.J. 11 (1980).

supreme court in *Fantastic Homes, Inc. v. Combs*²⁸¹ approved a court of civil appeals ruling that a nonmovant need not respond to a motion for summary judgment in order to urge on appeal that the movant's proof was insufficient to establish, as a matter of law, the specific grounds relied upon in such motion.²⁸² Two other court of civil appeals decisions rendered during the survey period reached the same conclusion.²⁸³

Fisher v. Capp,²⁸⁴ however, demonstrates how a nonmovant may lose the right to assert error on appeal by failing to file a written response to his opponent's motion for summary judgment. Appealing from a summary judgment entered against him, the nonmovant attempted to raise points of error regarding the defense of laches and limitations. Finding that the nonmovant had failed to present expressly those defenses in a written response or answer to the motion, the court of civil appeals refused to consider the points of error on appeal.²⁸⁵ In reaching that result, the court recognized that the "lesson of *Clear Creek* is crystal clear."²⁸⁶ If the nonmovant "does not file a written response to the motion for summary judgment, the only issue before the appellate court is whether the grounds expressly presented to the trial court by the movant's motion are insufficient as a matter of law to support summary judgment."²⁸⁷ Furthermore, "[a]ny other issue raised by the nonmovant in the appellate court must have first been raised in the trial court (1) by written specific response or answer to the motion for summary judgment (2) expressly presenting the issue to the trial court."²⁸⁸

Rule 166-A,²⁸⁹ which governs summary judgment practice, provides in part that "[d]efects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend."²⁹⁰ *Chandler v. El Paso National Bank*²⁹¹ represents a classic application of this provision of the rule. In *Chandler* the nonmovant, for the first time on appeal, attacked certain defects in the movant's proof that was submitted in support of the

281. 596 S.W.2d 502 (Tex.), *refusing application for writ of error n.r.e. per curiam*, 584 S.W.2d 340 (Tex. Civ. App.—Dallas 1979).

282. 596 S.W.2d at 502.

283. *Houchins v. Scheltz*, 590 S.W.2d 745, 751 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ); *Chandler v. El Paso Nat'l Bank*, 589 S.W.2d 832, 834-36 (Tex. Civ. App.—El Paso 1979, no writ).

284. 597 S.W.2d 393 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

285. *Id.* at 396-97.

286. *Id.* at 397.

287. *Id.*

288. *Id.*; *accord*, *Thurman v. Frozen Food Express*, 600 S.W.2d 369, 370 (Tex. Civ. App.—Dallas 1980, no writ). See also TEX. R. CIV. P. 166-A(c), which governs summary judgment practice and provides that "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." The term "answer" means "an answer to the motion, not an answer generally filed in response to a petition." *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979).

289. TEX. R. CIV. P. 166-A.

290. TEX. R. CIV. P. 166-A(e).

291. 589 S.W.2d 832 (Tex. Civ. App.—El Paso 1979, no writ).

motion for summary judgment. The movant had submitted pleadings from another action but had failed to have the copies of those pleadings certified. According to the court, however, the nonmovant waived his objection to the form of the proof by failing to object at the trial court level.²⁹² *Chandler* and the decision of *Thurman v. Frozen Food Express*²⁹³ also demonstrate that neither the movant nor the nonmovant may rely on his own answers to interrogatories or requests for admissions to support or defeat a motion for summary judgment.²⁹⁴

Rule 164,²⁹⁵ which governs nonsuit procedure, provides that "[u]pon the trial of any case at any time before plaintiff has rested his case, . . . the plaintiff may take a non-suit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief."²⁹⁶ In *Extended Services Program, Inc. v. First Extended Service Corp.*²⁹⁷ the nonmovant plaintiff filed a motion for nonsuit after the summary judgment hearing but before the trial court pronounced judgment. Reversing the trial court's action in overruling the motion for nonsuit, the court of civil appeals held that a summary judgment hearing was not a "trial" under rule 164 and, therefore, the lower court should have granted the motion for nonsuit.²⁹⁸ The court also ruled that summary judgment evidence that was not on file more than twenty-one days prior to the summary judgment hearing could not be considered by the trial court in ruling on the motion.²⁹⁹ Subsequent to *Extended Services*, rule 166-A was amended to provide that all supporting affidavits must be filed and served along with the motion at least twenty-one days before the time specified for hearing.³⁰⁰

XII. SPECIAL ISSUE SUBMISSION

Several appellate decisions during the survey period focused on the scope of submission of special issues under rule 277,³⁰¹ which abolished

292. *Id.* at 835.

293. 600 S.W.2d 369 (Tex. Civ. App.—Dallas 1980, no writ).

294. *Id.* at 370; *Chandler v. El Paso Nat'l Bank*, 589 S.W.2d at 835.

295. TEX. R. CIV. P. 164.

296. *Id.*

297. 601 S.W.2d 469 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

298. *Id.* at 471. *But see* *Claude Regis Vargo Enterprises, Inc. v. Bacarisse*, 578 S.W.2d 524, 529 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (summary judgment hearing held to be a "trial" within meaning of TEX. R. CIV. P. 63); *Bruce v. McAdoo*, 531 S.W.2d 354, 356 (Tex. Civ. App.—El Paso 1975, no writ) (summary judgment hearing held to be a "trial" within meaning of TEX. R. CIV. P. 63); *Jones v. Houston Materials Co.*, 477 S.W.2d 694 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ) (summary judgment hearing held to be a "trial" within meaning of TEX. R. CIV. P. 63).

299. 601 S.W.2d at 470. Prior to the 1981 amendments, rule 166-A(c) provided that "[e]xcept on leave of court, the motion shall be served at least twenty-one days before the time specified for the hearing." TEX. R. CIV. P. 166-A(c) (1978). The rule did not expressly contain a similar time limit for affidavits and proof submitted in support of the motion.

300. TEX. R. CIV. P. 166-A(c); *see* *Pope & McConnico*, *supra* note 1 at 489. The non-movant may file and serve counter-affidavits and responses at least seven days before the hearing. TEX. R. CIV. P. 166-A(c).

301. TEX. R. CIV. P. 277.

the former requirement that special issues be submitted distinctly and separately.³⁰² Rule 277 now provides that "[i]t shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly," and that "[i]t shall not be objectionable that a question is general or includes a combination of elements or issues."³⁰³ Giving this language full effect, the supreme court in *Brown v. American Transfer & Storage Co.*³⁰⁴ approved the use of broad issues in a suit to recover under the Texas Deceptive Trade Practices—Consumer Protection Act³⁰⁵ and directed that "[i]ssues in deceptive trade practice cases . . . should be submitted in terms as close as possible to those actually used in the statute."³⁰⁶ Similarly, in *Siebinlist v. Harville*³⁰⁷ the supreme court endorsed the submission of a single issue in a gross negligence action inquiring whether the manner in which the defendant operated his automobile "was a heedless and reckless disregard of the rights of others affected by it," followed by a definition of "heedless and reckless disregard."³⁰⁸ Finally, in *Carnation Co. v. Borner*,³⁰⁹ a suit for wrongful discharge of the plaintiff-employee under article 8307c³¹⁰ of the Texas Workers' Compensation Act, the court found no error in the submission of an issue inquiring whether the defendant-employer had "violated" the statute.³¹¹

Under former practice the trial judge was required to frame his charge so that he did "not therein comment on the weight of the evidence."³¹² This phrase was deleted by the 1973 amendments to the Texas Rules of Civil Procedure,³¹³ and the trial judge is now prohibited only from commenting directly on the weight of the evidence.³¹⁴ While this amendment relaxed the standard applicable in this area, the court in *Otto Vehle & Reserve Law Officers Ass'n v. Brenner*³¹⁵ reiterated that a submission to the jury that assumes a disputed material fact is never a permissible comment on the weight of the evidence and, therefore, constitutes reversible error.³¹⁶

302. See Tex. R. Civ. P. 277 (1967). See generally *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517 (1922).

303. TEX. R. CIV. P. 277; see Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 SW. L.J. 577 (1973); Pope & Lowerre, *The State of the Special Verdict—1979*, 11 ST. MARY'S L.J. 1 (1979).

304. 601 S.W.2d 931 (Tex. 1980).

305. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980-1981).

306. 601 S.W.2d at 937; accord, *Willis v. Johnson*, 603 S.W.2d 828, 829 (Tex. 1980) (per curiam). But see *Beaty v. Williams*, 596 S.W.2d 541, 543 (Tex. Civ. App.—Beaumont 1980, no writ).

307. 596 S.W.2d 113 (Tex. 1980).

308. *Id.* at 113 & n.1, 114-15.

309. 588 S.W.2d 814 (Tex. Civ. App.—Houston [14th Dist.] 1979, *aff'd*, 610 S.W.2d 450 (Tex. 1980).

310. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1980-1981).

311. 588 S.W.2d at 819.

312. Tex. R. Civ. P. 272 (1967).

313. TEX. R. CIV. P. 272; see *Civil Procedure Rules Amended*, 36 TEX. B.J. 495 (1973).

314. TEX. R. CIV. P. 277.

315. 590 S.W.2d 147 (Tex. Civ. App.—San Antonio 1979, no writ).

316. *Id.* at 150; accord, *City of Beaumont v. Fuentes*, 582 S.W.2d 221, 224 (Tex. Civ.

The portion of rule 277³¹⁷ that stipulates that "the court shall submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict"³¹⁸ had a bearing on a number of decisions during the survey period. Relying upon the general principle that terms of ordinary meaning are not required to be defined,³¹⁹ the court in *Holmes v. Holmes*³²⁰ concluded that the term "intentional," as used in the charge to the jury in an assault case, was a common term and necessitated no definition.³²¹ The court in *Stewart v. Moody*³²² considered a submission that asked the jury what sum of money, if any, would "reasonably and fairly compensate" the plaintiff for any "damages" he may have suffered as a result of "the occurrence in question," without any specification of the proper measure of damages.³²³ The court concluded that the lack of a damage standard constituted reversible error because it permitted the jury to take into account anything it considered as constituting damages.³²⁴ In contrast, the court in *Velasquez v. Livingston*³²⁵ endorsed the action of the trial court in refusing to instruct the jury concerning a presumption.³²⁶ While agreeing that the presumption applied to the case, the appellate court stated that "it does not follow that such a presumption should be presented to the jury in the form of an instruction," as "the only effect of this presumption is to fix the burden of producing evidence" and "[it] is not evidence of something to be weighed along with the evidence."³²⁷

Rule 274,³²⁸ which governs the making of objections to the charge of the trial court, requires that an objecting party "point out distinctly" the matter to which he objects and state the grounds of his objection.³²⁹ Faced with an objection to a special issue on the grounds that the issue was "global," one court³³⁰ during the survey period authoritatively held that such an objection was insufficient and failed to satisfy the specificity requirements of rule 274.³³¹

XIII. JURY PRACTICE

Although rule 233 provides that "[e]ach party to a civil suit shall be

App.—Beaumont 1979, no writ); *Cactus Drilling Co. v. Williams*, 525 S.W.2d 902, 906-07 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

317. TEX. R. CIV. P. 277.

318. *Id.*

319. See G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 37 (1959).

320. 588 S.W.2d 674 (Tex. Civ. App.—Beaumont 1979, no writ).

321. *Id.* at 675; see *Turner v. General Motors Corp.*, 584 S.W.2d 844, 847 (Tex. 1979).

322. 597 S.W.2d 556 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).

323. *Id.* at 558.

324. *Id.*; accord, *Planet Plows, Inc. v. Evans*, 600 S.W.2d 874, 876 (Tex. Civ. App.—Amarillo 1980, no writ).

325. 598 S.W.2d 346 (Tex. Civ. App.—Corpus Christi 1980, no writ).

326. *Id.* at 348.

327. *Id.*; accord, *Sanders v. Davila*, 593 S.W.2d 127, 130 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).

328. TEX. R. CIV. P. 274.

329. *Id.*

330. *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931 (Tex. 1980).

331. *Id.* at 938.

entitled to six peremptory challenges in a case tried in the district court,"³³² the fact that a person is named as a party to a suit does not in itself entitle him to six peremptory challenges.³³³ In order for two defendants to be entitled to more than six peremptory challenges between them, the interests of those defendants must be antagonistic on an issue with which the jury is concerned.³³⁴ Article 2151a,³³⁵ which interacts with rule 233, states that "[a]fter proper alignment of parties, it shall be the duty of the court to equalize the number of peremptory challenges provided under Rule 233, . . . in accordance with the ends of justice so that no party is given an unequal advantage" ³³⁶ In *Lorusso v. Members Mutual Insurance Co.*³³⁷ the plaintiff alleged that the trial court had erroneously granted the two defendants six peremptory challenges each. Relying on rule 503,³³⁸ a divided supreme court determined that a trial court's misallocation of peremptory challenges would not be presumed to be prejudicial and, therefore, the harmless error rule applied for purposes of appellate review.³³⁹ Reviewing the limited record that the plaintiff brought forward on appeal, the court concluded that the plaintiff "failed to establish that the error in the number of peremptory challenges granted defendant resulted in a 'materially unfair' trial so as to require a reversal under Rule 503."³⁴⁰

Two recent court of civil appeals decisions also addressed the procedure relating to peremptory challenges. The first, *Lubbock Manufacturing Co. v. Perez*,³⁴¹ involved a consolidated personal injury action between thirty-two plaintiffs and numerous defendants. Prior to the commencement of voir dire examination, the trial court was informed that a tentative settlement³⁴² had been reached between the plaintiffs and one of the defendants and that no adversity existed between the plaintiffs and that defendant.

332. TEX. R. CIV. P. 233.

333. See, e.g., *Retail Credit Co. v. Hyman*, 316 S.W.2d 769, 771 (Tex. Civ. App.—Houston 1958, writ ref'd). If a group of litigants has essentially common interests and is not antagonistic on an issue of fact, the group is considered to be only one "party" under rule 233. *Perkins v. Freeman*, 518 S.W.2d 532, 533 (Tex. 1974).

334. *Shell Chem. Co. v. Lamb*, 493 S.W.2d 742, 744 (Tex. 1973).

335. TEX. REV. CIV. STAT. ANN. art. 2151a (Vernon Supp. 1980-1981).

336. *Id.* A leading case on the proper procedure for alignment of parties is *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex. 1979), discussed in Figari, *supra* note 31, at 441-42.

337. 603 S.W.2d 818 (Tex. 1980) (5-4 decision).

338. TEX. R. CIV. P. 503, provides in part:

[T]hat no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that an error of law has been committed by the trial court in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the petitioner as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case

339. 603 S.W.2d at 821.

340. *Id.* at 822.

341. 591 S.W.2d 907 (Tex. Civ. App.—Waco 1979, no writ).

342. The form of settlement agreement proposed and eventually entered into was a "Mary Carter" agreement, which resulted in the acquisition by the settling defendant of a direct financial interest in the plaintiff's lawsuit. See generally *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 858 (Tex. 1977).

Notwithstanding this information, the trial court allotted six peremptory challenges to the plaintiffs and four challenges to the settling defendant. The other three defendants received a total of fourteen peremptory challenges.³⁴³ Furthermore, the trial court ordered the parties to exercise their challenges individually.³⁴⁴ On appeal from an unfavorable judgment, one of the defendants complained that the settling defendant and the plaintiffs should have received only six peremptory challenges between them. Rejecting this argument, the court of civil appeals stated that "the action of a trial court in apportioning strikes must of necessity be evaluated in terms of information available at the time the challenges are allocated—not on the basis of changes in the alignment of parties which may possibly occur thereafter during the course of the trial."³⁴⁵ In finding that the trial court had not abused its discretion, the appellate court relied heavily on the lack of a definite settlement agreement between the plaintiffs and the settling defendant at the time the jury was selected.³⁴⁶ In *Aetna Casualty & Surety Co. v. Shiflett*³⁴⁷ the court of civil appeals found that any error in the trial court's allotment of peremptory challenges was waived because the defendant failed to lodge a timely objection in the trial court.³⁴⁸

Rule 216³⁴⁹ requires that a jury demand be made and the jury fee be paid "on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance."³⁵⁰ In *Young v. Young*³⁵¹ the jury demand was not made until fourteen days prior to the date set for a nonjury trial. Finding that an unreasonable delay of the trial would result, the trial court concluded that the demand was not timely.³⁵² On appeal, the court of civil appeals held that the trial court's action was justified because the next available jury setting was six months later.³⁵³ The appellate court also noted that "[a] demand for jury made ten days in advance is not necessarily timely as a matter of law."³⁵⁴

Two decisions during the survey period addressed the permissible scope of final jury arguments. Appealing from an adverse judgment, the defend-

343. One of the defendants, who received four peremptory challenges, was also a plaintiff in the action. 591 S.W.2d at 921.

344. *Id.*

345. *Id.*

346. *Id.* at 921-22.

347. 593 S.W.2d 768 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

348. *Id.* at 772; see *Lewis v. Texas Employer's Ins. Ass'n*, 151 Tex. 95, 246 S.W.2d 599 (1952). For the same reason, failure to lodge a timely complaint, the court also found that the defendant waived its objection to the trial court's action in failing to allot equal time for jury argument. 593 S.W.2d at 772.

349. TEX. R. CIV. P. 216.

350. *Id.*

351. 589 S.W.2d 520 (Tex. Civ. App.—Austin 1979, writ dism'd).

352. *Id.*

353. *Id.* at 521.

354. *Id.*; see *Texas Oil & Gas Corp. v. Vela*, 429 S.W.2d 866, 877 (Tex. 1968); *Jackson v. Jackson*, 524 S.W.2d 308, 310 (Tex. Civ. App.—Austin 1975, no writ); *Sylvester v. Griffin*, 507 S.W.2d 649, 651 (Tex. Civ. App.—Austin 1974, no writ).

ant in *Harrison v. Harrison*³⁵⁵ complained that the plaintiff's attorney had made improper references in his closing argument that invited the jury to speculate as to whether the defendant was covered by insurance. The plaintiff's attorney had stated that the jury should not consider "who pays" the judgment and should answer certain issues "regardless of whether [plaintiff] John Edd ever gets a quarter or not . . . or regardless of from where or anything else."³⁵⁶ Additionally, the plaintiff's attorney had informed the jury that he could not tell them certain "things" but that "you're going to wonder, since these boys [*i.e.*, plaintiff and defendant] ain't got no dispute between each other what are we doing up here."³⁵⁷ The court of civil appeals concluded that the references were not improper.³⁵⁸

In *Queen City Land Co. v. State*,³⁵⁹ an eminent domain proceeding, the state's attorney remarked in closing argument that he did not blame the defendant "for trying to get all he can" and that the jury may refer "to it as greed or something of that nature."³⁶⁰ Recognizing that the use of the term "greed" was improper, the court of civil appeals nevertheless held that the defendant had waived its complaint by "failing to object and press for an instruction at the time of argument."³⁶¹ In the same case, the appellate court also ruled that the use of a calculator by the jury was not misconduct.³⁶²

Finally, jury qualifications and misconduct were also the subject of recent judicial consideration. In *Strange v. Treasure City*³⁶³ the supreme court reversed a finding by the court of civil appeals that alleged jury misconduct was "of such a nature and degree that a fair trial to appellant has been denied."³⁶⁴ The court noted that under rule 327³⁶⁵ the party seeking a new trial must show that the misconduct was material, and that the misconduct probably injured the complaining party.³⁶⁶ Although one juror had made a statement of personal bias that the court considered material, the court found that it did not result in probable injury to the defendant.³⁶⁷

355. 597 S.W.2d 477 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

356. *Id.* at 487.

357. *Id.*

358. *Id.* at 488; see *Benevides v. Peche*, 460 S.W.2d 207, 212 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.); *Renegar v. Cramer*, 354 S.W.2d 663, 669 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.); *Airline Motor Coaches v. Green*, 217 S.W.2d 70, 73 (Tex. Civ. App.—Beaumont 1949, writ ref'd n.r.e.). But see *Griffith v. Casteel*, 313 S.W.2d 149, 156-57 (Tex. Civ. App.—Houston [1st Dist.] 1958, writ ref'd n.r.e.).

359. 601 S.W.2d 527 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

360. *Id.* at 530.

361. *Id.*

362. *Id.*; see *Bobbie Brooks, Inc. v. Goldstein*, 567 S.W.2d 902, 907 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (use by jury of calculator held proper); *Solana v. Hill*, 348 S.W.2d 481, 484 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.) (use by jury of slide rule held proper).

363. 608 S.W.2d 604 (Tex. 1980).

364. 590 S.W.2d 816, 818 (Tex. Civ. App.—Dallas 1979).

365. TEX. R. CIV. P. 327.

366. 608 S.W.2d at 606.

367. *Id.* at 607-08.

Examining the other points of alleged misconduct, including discussions of attorney's fees, insurance, and taxes,³⁶⁸ the court concluded that the requirements of rule 327 had not been met and that the record as a whole did not show that the cumulative effect of the incidents resulted in probable injury.³⁶⁹

In *Bailey v. Tuck*³⁷⁰ the appellant claimed that the trial court erred in failing to grant a new trial because one of the jurors was illiterate and, thus, was not qualified to serve on the jury. The court of civil appeals, however, found that the appellant had waived any objection to the challenged juror due to the appellant's failure to complain until after an unfavorable verdict had been rendered.³⁷¹ The court also rejected the appellant's contention that a new trial should have been granted because one juror translated some of the special issues into Spanish for another juror during their deliberations.³⁷²

XIV. JUDGMENT

Although former rule 306a³⁷³ designated that the date of the signing of the judgment should be used in determining the time for actions taken in connection with a judgment, many of the rules contained confusing references to "rendition" of judgment.³⁷⁴ As part of the simplification that the 1981 amendments to the Texas Rules of Civil Procedure effected, the amended rules uniformly substitute the signing of the judgment or other order as the operative event for the calculation of time.³⁷⁵ In still another amendment, rule 731³⁷⁶ was modified to allow execution to issue in the name of a defendant as well as a plaintiff in a trial of right of property.³⁷⁷

In *Jarrett v. Northcutt*,³⁷⁸ a bill of review procedure to set aside the property settlement entered in a prior divorce, the supreme court held that a showing of "lack of fault or negligence in permitting a meritorious defense to go unasserted in a prior action" was essential to the plaintiff's petition.³⁷⁹ In *Coon v. Pettijohn & Pettijohn Plumbing, Inc.*³⁸⁰ the court

368. *Id.* at 606-09.

369. *Id.* at 609.

370. 591 S.W.2d 605 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

371. *Id.* See generally 3 R. McDONALD, TEXAS CIVIL PRACTICE § 11.05 (1970).

372. 591 S.W.2d at 609.

373. Tex. R. Civ. P. 306a (1978). For a discussion of the new version of TEX. R. CIV. P. 306a, see notes 414-18 *infra* and accompanying text.

374. See, e.g., Tex. R. Civ. P. 296, 300-305, 306b (1978).

375. E.g., TEX. R. CIV. P. 296 (time to request conclusions of law and fact); TEX. R. CIV. P. 297 (time to file findings and conclusions); TEX. R. CIV. P. 306b (time to perfect appeal from nunc pro tunc); TEX. R. CIV. P. 524 (justice court docket to reflect date of signing); TEX. R. CIV. P. 566 (time for justice to set aside default judgment); TEX. R. CIV. P. 627 (time for issuance of execution); TEX. R. CIV. P. 657 (time judgment final for garnishment).

376. Compare TEX. R. CIV. P. 731 with TEX. R. CIV. P. 733 (1978).

377. Comments to this amendment recite that the change was made to conform to the due process requirements of *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); and *Fuentes v. Shevin*, 407 U.S. 600 (1972). TEXAS RULES OF CIVIL PROCEDURE 299 (West 10th ed. 1981).

378. 592 S.W.2d 930 (Tex. 1980).

379. *Id.* at 930-31.

380. 587 S.W.2d 551 (Tex. Civ. App.—Fort Worth 1979, no writ).

held that a default judgment in a suit upon a sworn account cannot be supported by a sworn pleading that is insufficient under rule 185.³⁸¹

XV. MOTION FOR A NEW TRIAL

Several of the rules governing motions for new trial were affected by the 1981 amendments. The most significant change was made in rule 329b,³⁸² which sets forth the timetable to be followed for a motion for a new trial and for any subsequent appeal. A motion for a new trial must now be filed within thirty days "after the judgment or other order complained of is signed."³⁸³ Any number of amended motions may be filed within the thirty days, provided that the amended motion is filed before the preceding motion is overruled.³⁸⁴ Motions not ruled on by the court are now overruled by operation of law seventy-five days after the judgment or other order complained of is signed.³⁸⁵ Further, the parties may no longer agree to postpone this deadline.³⁸⁶

The trial court still has plenary power to vacate, modify, correct, or reform the judgment, or to grant a new trial within thirty days after the judgment is signed.³⁸⁷ The period for exercising the power, however, is now extended by the filing of a timely motion for new trial for an additional thirty days after all such motions are overruled, whether by signed order or by operation of law.³⁸⁸ The amended rule also codifies prior common law that clerical errors may be corrected at any time,³⁸⁹ and that modification, correction, or reformation of the judgment starts anew the running of time for appeal.³⁹⁰

381. *Id.* at 552-53; TEX. R. CIV. P. 185. For a discussion of the pleading defects fatal to the judgment in that case, see text accompanying notes 152-55 *supra*.

382. TEX. R. CIV. P. 329b.

383. *Id.* This change enlarges the time to file the motion from 10 to 30 days, and, consistent with other rule changes, starts the time running upon the signing of the judgment, instead of the less precise rendition of judgment. See text accompanying notes 373-75 *supra*. The movant is no longer required to "present" the motion to the trial court. See TEX. R. CIV. P. 329b(4) (1978).

384. TEX. R. CIV. P. 329b(b). The former rule allowed only one amended motion to be filed within 20 days of the filing of the original motion, and before the original motion was overruled. TEX. R. CIV. P. 329b(2) (1978).

385. TEX. R. CIV. P. 329b(c). This amendment simplifies the timetable by consolidating three separate timetables from the former rule: (1) 10 days from judgment to file original motion; (2) 20 days from filing original motion to file amended motion; (3) 45 days from last motion until motion overruled by operation of law. TEX. R. CIV. P. 329b(1)-(3) (1978).

386. TEX. R. CIV. P. 329b; see TEX. R. CIV. P. 329b(3) (1978).

387. TEX. R. CIV. P. 329b(d).

388. TEX. R. CIV. P. 329b(e). No extension of the 30 days during which the court had plenary power resulted from the filing of a timely motion under the former rule. TEX. R. CIV. P. 329b(5) (1978). Now, with a timely motion for a new trial, a court can vacate, modify, correct, or reform a judgment or grant a new trial as late as 105 days after the judgment is signed.

389. TEX. R. CIV. P. 329b(f). See generally 4 R. McDONALD, TEXAS CIVIL PRACTICE § 17.08.1 (Elliott rev. ed. 1971); Reavley & Orr, *Trial Court's Power to Amend Its Judgments*, 25 BAYLOR L. REV. 191 (1973).

390. TEX. R. CIV. P. 329b(h); see *City of West Lake Hills v. State ex rel. City of Austin*, 466 S.W.2d 722, 727 (Tex. 1971). The rule expressly states that "any" such modification has

Rule 324³⁹¹ has been amended to make a motion for a new trial necessary to present a complaint "upon which evidence must be heard, such as one of jury misconduct or of newly discovered evidence."³⁹² The amendments have dropped the requirement that a motion for a new trial be made in order to present any complaint "which ha[d] not otherwise been ruled upon."³⁹³

Rules 320³⁹⁴ and 321³⁹⁵ were both amended to clarify motion for new trial terminology; the motion is now required to set forth "points" relied upon rather than "grounds" for granting the motion.³⁹⁶ Under the new version of rule 329,³⁹⁷ the signing of the judgment begins the two-year period for granting a new trial after a default judgment entered on citation by publication.³⁹⁸

The supreme court has evidenced a liberal approach to motions for a new trial in two recent cases. In *Airco, Inc. v. Tijerina*³⁹⁹ the defendant stumbled into one of the procedural traps that amended rule 329b⁴⁰⁰ will eliminate. The defendant mailed to the clerk a motion for a new trial and a motion for remittitur in the same envelope; the motion for remittitur was filed first. Less than twenty days later, the defendant filed an amended motion for a new trial. The trial court overruled the amended motion and the defendant filed a certificate of deposit⁴⁰¹ less than thirty days later.⁴⁰² The court of civil appeals ruled that the motion for remittitur was actually a motion for a new trial, thus making the motion for a new trial that was filed subsequent to the motion for remittitur the one permissible amended motion for a new trial.⁴⁰³ As a result, the court ruled that the certificate of deposit was filed late and accordingly dismissed the appeal.⁴⁰⁴ In reversing, the supreme court relied upon the principle that "[a]ppellate review . . . is a valuable right and should not be denied when under a liberal interpretation of the Rules it is possible to give it."⁴⁰⁵ The court therefore

this effect. TEX. R. CIV. P. 329b(h). The amendment, however, does not state that the time limits for filing a motion for new trial start anew after such a modification; it refers only to "the time for appeal." *Id.*

391. TEX. R. CIV. P. 324.

392. *Id.*; see notes 429-30 *infra* and accompanying text.

393. TEX. R. CIV. P. 324 (1978). TEX. R. CIV. P. 373, however, still requires a party to make "known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor."

394. TEX. R. CIV. P. 320.

395. TEX. R. CIV. P. 321.

396. These amendments were part of the broader effort to make the rules consistent. *See, e.g.*, TEX. R. CIV. P. 458, 515.

397. TEX. R. CIV. P. 329.

398. *Id.* This change is one of those designed to eliminate rendition of judgment as an operative act and substitute in its place the signing of the judgment. *See* notes 373-75 *supra* and accompanying text.

399. 603 S.W.2d 785 (Tex. 1980).

400. TEX. R. CIV. P. 329b.

401. TEX. R. CIV. P. 356(a) authorizes a deposit of cash in lieu of a cost bond.

402. 603 S.W.2d at 786.

403. 598 S.W.2d 5, 6-7 (Tex. Civ. App.—San Antonio 1979) (per curiam).

404. *Id.*

405. 603 S.W.2d at 786 (quoting *Bay v. Mecom*, 393 S.W.2d 819, 820 (Tex. 1965)).

refused to adopt a technical view of the pleadings and held that the motions for remittitur and for a new trial should not be construed to be separate motions for new trial.⁴⁰⁶

In *Howell v. Coca-Cola Bottling Co.*⁴⁰⁷ the supreme court observed that "[t]he intent of Rule 324 was to eliminate motions for new trial."⁴⁰⁸ Accordingly, while the supreme court refused the writ of error, finding no reversible error, the court disapproved the court of civil appeals' holding⁴⁰⁹ that a motion for a new trial was necessary in a nonjury case to preserve error by the trial court in sustaining special exceptions based on the bar of limitations.⁴¹⁰

A good discussion of the elements of a motion for a new trial sufficient to warrant the reversal of a default judgment is found in *Mitchell v. Webb*.⁴¹¹ Observing that such matters are within the discretion of the trial court, the court of civil appeals affirmed the denial of the defendant's motion because it failed to offer to reimburse the plaintiff for any costs incurred in securing the default judgment and because it failed to recite that the defendant was "ready, willing or able to go to trial immediately."⁴¹²

XVI. APPELLATE PROCEDURE

During the survey period major changes in appellate procedure were effected by amendments to the Texas Rules of Civil Procedure.⁴¹³ The starting point for these changes was rule 306a,⁴¹⁴ which was amended to provide that the time period for filing documents connected with perfecting an appeal⁴¹⁵ is measured from the date a judgment or order is signed, "as shown of record."⁴¹⁶ Although the rule specifically directs the parties and the court to have the signature date recited within the judgment or

406. 603 S.W.2d at 786. Two amendments to rule 329b have eliminated this problem: there is now no limit on the number of amended motions for new trial which one may file; and calculation of the date for filing the cost bond is now made from the date of the signing of the judgment, without regard to when a motion for new trial is filed. TEX. R. CIV. P. 329b.

407. 599 S.W.2d 801 (Tex. 1980). See also note 430 *infra*.

408. 599 S.W.2d at 802.

409. 595 S.W.2d 208, 213 (Tex. Civ. App.—Amarillo 1980).

410. 599 S.W.2d at 801.

411. 591 S.W.2d 547, 550 (Tex. Civ. App.—Fort Worth 1979, no writ).

412. *Id.* The court found the defendant's recitation that the granting of the motion would not delay or otherwise injure the plaintiff insufficient, absent the offer to proceed immediately to trial. *Id.*

413. See Boyd, *New Amendments to Texas Rules of Civil Procedure: From Judgment to Appeal*, 43 TEX. B.J. 1040 (1980); Hagerman, *Highlights of Changes in the 1981 Civil Trial Rules*, 43 TEX. B.J. 991 (1980); Pope & McConnico, *supra* note 1, at 492-532. See also note 1 *supra* and accompanying text.

414. TEX. R. CIV. P. 306a.

415. The rule expressly mentions motions for new trials, appeal bonds, notices of appeal, affidavits in lieu of bond, bills of exception, the transcript, and the statement of facts, but is not limited to those documents. *Id.*

416. *Id.* Thus, the various steps for perfecting an appeal now measure from a single uniform act. TEX. R. CIV. P. 306a (1978), in contrast, merely provided that the date of the signing of the judgment or order was to be used in determining the time periods within which such steps were to be taken.

order,⁴¹⁷ the absence of this recitation is not fatal; the date may be determined by a showing "in the record by a certificate of the judge or otherwise."⁴¹⁸

In keeping with the underlying purpose of the 1981 amendments, to simplify the procedures for appeal,⁴¹⁹ the rules governing appeals from bench trials have been amended. Rule 297⁴²⁰ now provides that upon proper request⁴²¹ the judge must file findings of fact and conclusions of law within thirty days after the signing of the judgment or order overruling a motion for a new trial.⁴²²

In addition to simplifying the procedures for filing motions for a new trial,⁴²³ the 1981 amendments made several significant changes in motions for new trial practice insofar as appeals are concerned. Under rule 329b,⁴²⁴ amended motions for a new trial no longer extend the time period for perfecting an appeal.⁴²⁵ On the other hand, motions for modifications, corrections, or reformations of the judgment, which are now governed by rule 329b,⁴²⁶ extend the time for perfecting an appeal "in the same manner as a motion for new trial,"⁴²⁷ and the time for appeal runs from the date of the signing of such a modified judgment.⁴²⁸

Amended rule 324⁴²⁹ now provides that a motion for a new trial is not a prerequisite to appeal except "in order to present a complaint upon which evidence must be heard, such as one of jury misconduct or newly discovered evidence."⁴³⁰ The amendments also alter the effect a timely motion

417. TEX. R. CIV. P. 306a.

418. *Id.* This addition to the rule liberalizes the method for determining the date of signing if it is not reflected within the order itself.

419. See Pope & McConnico, *supra* note 1, at 492-93.

420. TEX. R. CIV. P. 297.

421. TEX. R. CIV. P. 296 requires a party desiring findings of fact and conclusions of law to file a request within 10 days after the judgment is signed or a motion for a new trial is overruled expressly or by operation of law. In contrast, former rule 296 required the request to be made within 10 days after the "rendition" of judgment or order overruling motion for new trial. TEX. R. CIV. P. 296 (1978). In keeping with the intent underlying rule 306a, to establish the date of the signing of the judgment or order as the critical date, the 1981 amendments uniformly deleted confusing references in the rules to "rendition" or "entry" of judgments and orders. See notes 373-75 *supra* and accompanying text.

422. TEX. R. CIV. P. 297. The rule formerly required filing of the findings and conclusions 30 days before the time for filing the transcript. TEX. R. CIV. P. 297 (1976).

423. See notes 382-85 *supra* and accompanying text.

424. TEX. R. CIV. P. 329b.

425. Under TEX. R. CIV. P. 329b(3) (1978), determination of a motion for a new trial that had been amended was required to be made within certain periods after the date the amended motion was filed. The amendment extended the allowable periods for perfecting appeals, which date from the overruling of a motion for a new trial. See TEX. R. CIV. P. 356(2) (1978). The present rule requires that the determination be made within a certain period after the judgment is signed, and the periods for perfecting an appeal run uniformly from the date the judgment is signed. TEX. R. CIV. P. 329b(c), 356.

426. TEX. R. CIV. P. 329b(g); see notes 388-90 *supra* and accompanying text.

427. TEX. R. CIV. P. 329b(g).

428. *Id.*

429. TEX. R. CIV. P. 324.

430. *Id.* This provision is substituted for one that required a motion for new trial "in order to present a complaint which has not otherwise been ruled on." See TEX. R. CIV. P. 324 (1978). The former provision left an ambiguity as to the necessity of motions for a new

for a new trial has on the time allowed for perfecting an appeal. The filing of such a motion now extends the time within which a required cost bond⁴³¹ or notice of appeal must be filed to ninety days after the judgment is signed.⁴³² Thus, the date the judgment is signed determines the time to perfect appeal rather than the date the motion for a new trial is overruled.⁴³³ Further, one party may rely on a motion filed by any other party to extend the time for appeal.⁴³⁴ In the absence of a motion for a new trial by any party, however, the bond or notice of appeal must be filed within thirty days after the judgment is signed.⁴³⁵

Amended rule 356,⁴³⁶ in addition to providing an automatic ninety-day extension when a motion for new trial is filed,⁴³⁷ also permits a party to move for an extension of time within which to perfect the appeal by filing a cost bond, an affidavit, or a notice of appeal.⁴³⁸ In order to obtain such an extension, the party must file a motion with the appellate court "reasonably explaining" the need for the extension⁴³⁹ within fifteen days after the last day for perfecting the appeal.⁴⁴⁰ Significantly, however, during the same period the party must also file the necessary cost bond, affidavit, or notice with the trial court.⁴⁴¹ Although the language of the rule is not explicit, the courts apparently will require the necessary filing of a cost bond or a notice not only within the fifteen-day period, but simultaneously with or prior to the filing of the motion to extend.⁴⁴² Of extreme signifi-

trial in nonjury cases, which resulted in a conflict among the courts of civil appeals. *Compare* Brock v. Brock, 586 S.W.2d 927, 929-30 (Tex. Civ. App.—El Paso 1979, no writ) with Brown v. Brown, 590 S.W.2d 808, 810-11 (Tex. Civ. App.—Eastland 1979, no writ). This conflict was resolved in Howell v. Coca-Cola Bottling Co., 599 S.W.2d 801 (Tex. 1980), when the supreme court, disapproving *Brock*, held that a motion for a new trial was unnecessary in a nonjury case to complain of the insufficiency of the evidence or to complain of a dismissal after the sustaining of special exceptions. 599 S.W.2d at 802.

431. The same provisions governing cost bonds also govern an affidavit of inability filed in lieu thereof. TEX. R. CIV. P. 356(a).

432. TEX. R. CIV. P. 356(a), (c).

433. See TEX. R. CIV. P. 356(a) (1978).

434. TEX. R. CIV. P. 356. This is a significant change from the prior practice, which prevented one party from relying on another party's motion for a new trial to extend the date for filing the bond, notice, or affidavit necessary to appeal. See, e.g., *Angelina County v. McFarland*, 374 S.W.2d 417, 421 (Tex. 1964).

435. TEX. R. CIV. P. 356(a), (c). The rule formerly required such a filing within 30 days after the rendition of a judgment or an order overruling a motion for a new trial. TEX. R. CIV. P. 356(a) (1978).

436. TEX. R. CIV. P. 356.

437. See note 432 *supra* and accompanying text.

438. TEX. R. CIV. P. 356(b). Rule 21c, formerly the only rule authorizing extensions of time on appeal, has never applied to cost bonds, affidavits, or notices of appeal, but only to transcripts, statements of fact, motions for rehearing, and applications for writ of error to the supreme court. TEX. R. CIV. P. 21c.

439. TEX. R. CIV. P. 356(b). This requirement parallels that of TEX. R. CIV. P. 21c. For an explanation of the "reasonably explaining" requirement, see *Meshwert v. Meshwert*, 549 S.W.2d 383 (Tex. 1977). See also *Figari*, *supra* note 22, at 423-24.

440. TEX. R. CIV. P. 356(b).

441. *Id.* Unlike rule 21c, which merely requires the moving party to file the motion within 15 days of the otherwise applicable date for filing the document and gives the appellate court the discretion as to the length of the extension, rule 356 requires that the document itself actually be filed within the 15-day period as well. *Id.*

442. See Minutes, Hearing Before Advisory Committee 66 (Nov. 16, 1979), in which

cance is the fact that the extension of time provided in rule 356 is a one-time extension for only fifteen days;⁴⁴³ with this one exception, the timely filing of a cost bond or a notice of appeal remains a jurisdictional prerequisite to an appeal.⁴⁴⁴

Changes were also made in the time periods within which the steps to perfect an appeal by affidavit of inability to pay costs are required.⁴⁴⁵ The affidavit must now be filed within the same time periods as a cost bond or a notice of appeal, *i.e.*, thirty days from signing of judgment or, if a timely motion for a new trial is filed, ninety days from the signing of the judgment.⁴⁴⁶ In addition, a specific provision of rule 355⁴⁴⁷ requires that notice of the filing of the affidavit be given to the opposing party within two days.⁴⁴⁸ Thereafter, any party or interested court officer may file a contest to the affidavit within ten days of the filing of the affidavit.⁴⁴⁹ Although the affiant party still has the burden of proof as to his inability to pay costs,⁴⁵⁰ failure to file a timely contest or to obtain a ruling on the contest within ten days after its filing results in an automatic overruling of the contest.⁴⁵¹ On the other hand, if a contest is sustained, the time for filing the bond is extended for ten days from the date of the sustaining order unless the trial court recites therein that the affidavit was not filed in good faith.⁴⁵²

The sweeping changes of the 1981 amendments also affected the time periods for perfecting appeals from interlocutory orders and quo warranto proceedings.⁴⁵³ Now called "accelerated appeals,"⁴⁵⁴ these appeals are perfected by filing the bond, deposit, affidavit, or notice within thirty days after the judgment or order is signed.⁴⁵⁵ Motions for a new trial are pro-

Judge Clarence Guittard stated: "[The movant] has to file his bond when he files his motion."

443. See notes 438-40 *supra* and accompanying text.

444. See Pope & McConnico, *supra* note 1, at 501.

445. TEX. R. CIV. P. 355, 356(a).

446. TEX. R. CIV. P. 356(a). The 15-day extension permitted by rule 356(b) is also applicable to affidavits of inability. The former version of rule 356 required the affidavit to be filed within 20 days after the rendition of a judgment or an order overruling a motion for a new trial. TEX. R. CIV. P. 356(b) (1978).

447. TEX. R. CIV. P. 355(b).

448. *Id.* The rule formerly required that notice be given "forthwith." TEX. R. CIV. P. 355(b) (1978).

449. TEX. R. CIV. P. 355(c). The 10-day period for filing a contest formerly dated from the notice. TEX. R. CIV. P. 355(c) (1978).

450. TEX. R. CIV. P. 355(d); *accord*, TEX. R. CIV. P. 355(d) (1978).

451. TEX. R. CIV. P. 355(e). Under the prior version of the rule, only a failure to file the contest timely would have this effect. TEX. R. CIV. P. 355(e) (1978). The rule now makes clear that a ruling must be made within 10 days of the affidavit's filing.

452. TEX. R. CIV. P. 356(b). This provision together with the 10-day ruling requirement should eliminate the harsh results reached in cases such as *King v. Payne*, 156 Tex. 105, 110, 292 S.W.2d 331, 334 (1956) (delay in acting on contest does not extend time for filing appeal cost bond).

453. See TEX. R. CIV. P. 385(d).

454. TEX. R. CIV. P. 385.

455. TEX. R. CIV. P. 385(d). Previously, these documents were required to be filed within 20 days after the rendition of the order appealed from. TEX. R. CIV. P. 385(a) (1978).

hibited in the case of appeals from interlocutory orders⁴⁵⁶ and, although permitted in quo warranto proceedings, the motions do not extend the time for perfecting appeal.⁴⁵⁷

The 1981 amendments also altered the procedure for perfecting an appeal. Notices of appeal continue to be unnecessary as an appeal prerequisite⁴⁵⁸ unless the law does not require a cost bond.⁴⁵⁹ When a notice is necessary, however, rule 356 now requires that it be filed in writing with the trial court.⁴⁶⁰ The rule expressly eliminates oral notice or recitals in the judgment as proper methods to give notice of appeal.⁴⁶¹

Rule 354,⁴⁶² governing cost bonds, was amended to add "interested officers of the court" to the class of persons who may seek an increase or decrease in the amount of the bond.⁴⁶³ Further, the amendments make clear that only the trial court may make such a determination for a period of thirty days after the bond is filed;⁴⁶⁴ the appellate court will not entertain such a motion until that period has expired.⁴⁶⁵ The rule also states that an order increasing the amount of bond does not "affect perfecting of the appeal."⁴⁶⁶ The clerk and reporter need not prepare the record until the order is complied with, and failure to comply with such an order will result in dismissal of the appeal or affirmance of the judgment.⁴⁶⁷

Changes were also made in the procedures for filing a deposit in lieu of bond. It is now sufficient to file a cash deposit of \$500, less such sums as

456. TEX. R. CIV. P. 385(b). *See also* TEX. R. CIV. P. 385(e) (1978).

457. TEX. R. CIV. P. 385(c).

458. TEX. R. CIV. P. 356(c). The provision requiring notice of appeal only in limited cases was formerly contained in TEX. R. CIV. P. 354(c) (1978). On the other hand, notices of limitation of appeal continue to be essential if the appellant wishes to limit the issues that may be raised before the appellate court. *See* TEX. R. CIV. P. 353. Such notices are now required to be filed within 15 days after the judgment is signed or, if a motion for a new trial is filed, within 75 days after the judgment is signed. *Cf.* TEX. R. CIV. P. 353 (1978) (notice must be filed within 15 days after rendition of judgment or order overruling motion for new trial).

459. *See, e.g.,* TEX. PROB. CODE ANN. § 29 (Vernon 1980); TEX. REV. CIV. STAT. ANN. art. 279a (Vernon 1973); *id.* art. 1174 (Vernon 1963); *id.* art. 2072 (Vernon 1964); *id.* art. 2276 (Vernon 1971).

460. TEX. R. CIV. P. 356(c).

461. *Id.* Even before this clarification of the rule, the supreme court in *Texas Animal Health Comm'n v. Nunley*, 598 S.W.2d 233 (Tex. 1980), held that a recitation in the judgment and a request for preparation of the transcript were insufficient to comply with the rule governing notices of appeal; the court concluded that a separate notice of appeal filed with the clerk was a prerequisite to appeal. *Id.* at 234.

462. TEX. R. CIV. P. 354.

463. TEX. R. CIV. P. 354(a). *Volpe v. Stephens*, 589 S.W.2d 809 (Tex. Civ. App.—Dallas 1979, no writ), illustrates the reason for this change. In that case the appellant filed a \$500 bond and requested the court reporter to prepare a statement of facts; the court reporter refused to do so unless a further deposit was made. The court of civil appeals held that the reporter was required to prepare the statement of facts, that the \$500 bond was sufficient on its face unless challenged by a party, and that the reporter's only remedy was by way of a motion in the appellate court to require an additional bond. *Id.* at 811-12.

464. TEX. R. CIV. P. 354(a).

465. *Id.* *See also* TEX. R. CIV. P. 365, governing the procedure for increasing bond by motion in the appellate court.

466. TEX. R. CIV. P. 354(a).

467. *Id.*

the appellant has paid on the costs.⁴⁶⁸ As is the case with a bond, any party or "interested officer of the court" may seek an increase or decrease in the amount of the deposit.⁴⁶⁹

Once the appeal is perfected, the record must be prepared and filed. Prior to 1978, filing of the record within the time allowed was a jurisdictional prerequisite to appeal.⁴⁷⁰ In 1978 the rules were amended to permit a party to obtain an extension of time for filing the record.⁴⁷¹ Continuing the liberalizing trend, the 1981 amendments altered both the time periods for filing the record and the effect of a failure to file within the prescribed time period. Rule 386⁴⁷² now provides that the transcript and the statement of facts in unaccelerated appeals are to be filed in the appellate court sixty days after the judgment is signed, or, when a timely motion for a new trial has been filed, within 100 days after the judgment is signed.⁴⁷³ In cases of accelerated appeals,⁴⁷⁴ the record must be filed within the same period as the bond or other perfecting document,⁴⁷⁵ that is, within thirty days after the judgment or order is signed.⁴⁷⁶

Significantly, however, the amended rules also state that failure to file within the prescribed times "shall not affect the court's jurisdiction or its authority to consider material filed late."⁴⁷⁷ In accordance with this provision, the clerk of the appellate court is no longer empowered to refuse to file a tardy transcript or statement of facts.⁴⁷⁸ Nevertheless, because late filing is an express ground for dismissing an appeal, affirming the judgment,⁴⁷⁹ disregarding untimely materials, or applying adverse presumptions,⁴⁸⁰ an appellant who is unable to file the record on time should seek

468. *Id.* Under the prior version of the rule, a cash deposit was permissible, but it was required to be in an amount determined by the clerk to be sufficient to cover the estimated costs in the trial court and the cost of the record less amounts already paid. Tex. R. Civ. P. 354(a) (1978).

469. TEX. R. CIV. P. 354(a); see note 463 *supra* and accompanying text.

470. See, e.g., *Matlock v. Matlock*, 151 Tex. 308, 313, 249 S.W.2d 587, 590 (1952).

471. See TEX. R. CIV. P. 21c.

472. TEX. R. CIV. P. 386.

473. *Id.* Formerly, the rule required the filing of the record within 60 days after the rendition of a judgment or an order overruling a motion for a new trial. Tex. R. Civ. P. 386 (1978).

474. TEX. R. CIV. P. 385.

475. See note 455 *supra* and accompanying text.

476. TEX. R. CIV. P. 385(d).

477. *Id.*; see TEX. R. CIV. P. 386. In addition, rule 385 now provides that the failure to file the record timely in accelerated appeals may be excused if "reasonably explained." TEX. R. CIV. P. 385(d). The rule previously excused such a failure only upon a showing of "good cause." Tex. R. Civ. P. 385(b) (1978); see, e.g., *Guaranty Bank v. Thompson*, 595 S.W.2d 633, 634 (Tex. Civ. App.—Waco 1980, writ *dism'd*).

478. Compare Tex. R. Civ. P. 389-389a (1978) with TEX. R. CIV. P. 389-389a. The clerk, however, may still refuse to file a transcript not properly endorsed by the clerk of the lower court or a statement of facts not authenticated by the reporter. See note 486 *infra* and accompanying text.

479. TEX. R. CIV. P. 387 now provides that the court, upon motion of the appellee or its own motion, may dismiss the appeal or affirm the judgment for want of jurisdiction or failure to comply with the rules or any court order. Notice must be given to the appellant, however, and he may file a response within 10 days showing "grounds for continuing the appeal." *Id.*

480. TEX. R. CIV. P. 386.

an extension under rule 21c to avoid prejudice.⁴⁸¹

The procedures for procuring and filing the record were also changed by the 1981 amendments. Rule 376,⁴⁸² as amended, now places the burden on the clerk of the trial court not only to prepare the transcript, but also to transmit it to the appellate court. The appealing party must, however, designate the particular appellate court to receive it.⁴⁸³ In addition, the rule added "the notice of limitation of appeal" to the list of documents to be included in the transcript.⁴⁸⁴ Rule 377⁴⁸⁵ now permits the statement of facts to be filed when certified by the official court reporter.⁴⁸⁶ Disagreements as to the accuracy of the statement of facts may now be settled after its filing by referring the dispute to the trial court for hearing.⁴⁸⁷

The feasibility of appeals on partial statements of facts was significantly enhanced by the addition of a provision to rule 377 stating that when a partial statement is filed "there shall be a presumption on appeal that nothing omitted from the record is relevant . . . to the disposition of the appeal."⁴⁸⁸ Accordingly, the provision of the rule permitting an appellee to designate additional matters to be included in the statement⁴⁸⁹ takes on added significance and imposes an additional duty on the appellee when the appellant proposes a partial statement.⁴⁹⁰ An appellant requesting such a partial statement, however, must file a statement of points to be relied on and is thereafter limited to those points.⁴⁹¹

Under amended rule 381⁴⁹² bills of exception are required when pertinent matters are not included in the filed documents or in the record made by the official reporter. Bills of exception must now be prepared and completed within sixty days after the judgment is signed, or when a timely motion for a new trial has been made, within ninety days after the judg-

481. TEX. R. CIV. P. 21c. *See also* notes 438-40 *supra* and accompanying text.

482. TEX. R. CIV. P. 376. Formerly, the appellant had the burden to transmit the transcript. *See, e.g.*, *Guaranty Bank v. Thompson*, 595 S.W.2d 633, 634 (Tex. Civ. App.—Waco 1980, writ dismissed) (negligent failure of clerk to file transcript chargeable to appellant).

483. TEX. R. CIV. P. 376.

484. *Id.* *See generally* note 458 *supra*.

485. TEX. R. CIV. P. 377(e).

486. TEX. R. CIV. P. 377(d) (1978) required either agreement of the parties or court approval of the record.

487. TEX. R. CIV. P. 377(e).

488. TEX. R. CIV. P. 377(d). Under prior practice omitted material was presumed to support the judgment. *See, e.g.*, *Dennis v. Hulse*, 362 S.W.2d 308, 310 (Tex. 1962).

489. TEX. R. CIV. P. 377(d). The appellant must not only notify the appellee of the portions of the evidence requested to be included in the statement of facts, but, where a partial statement is requested, must also include in the request a statement of the points to be relied on. *Id.* The appellee then has 10 days after the notice to designate additional portions for inclusion. TEX. R. CIV. P. 377(c).

490. Because amended rule 377 retains the provision permitting monetary sanctions to be imposed for requiring unnecessary testimony in the statement of facts, the appellee cannot with impunity simply designate the entire testimony. TEX. R. CIV. P. 377(f). *See also* Tex. R. CIV. P. 377(e) (1978).

491. TEX. R. CIV. P. 377(d).

492. TEX. R. CIV. P. 381.

ment is signed.⁴⁹³ Such a bill may be included in the transcript or, upon a motion showing good cause, in a supplemental transcript.⁴⁹⁴

Once the record has been filed, rule 428⁴⁹⁵ authorizes supplementation by amendment to include omitted material. In addition, a provision added by the 1981 amendments requires the appellate court to allow the supplementation if the omitted matter is material and the supplementation will not unduly delay the disposition of the appeal.⁴⁹⁶

In unaccelerated appeals, the times for filing the briefs of appellant and appellee were not changed by the 1981 amendments.⁴⁹⁷ In cases of accelerated appeals,⁴⁹⁸ the appellant's brief must be filed within twenty days after the record is filed; the appellee's brief must be filed within twenty days thereafter.⁴⁹⁹ The rules, however, now permit the parties to gain extensions of the time for filing "[u]pon motion showing a reasonable explanation" of the need for more time.⁵⁰⁰ Rule 418,⁵⁰¹ governing the form of briefs, further liberalizes appellate procedure by permitting combinations of various related complaints into a single point of error so long as separate record references are made to enable the court to understand the nature of each complaint.⁵⁰² The rule also increases the number of copies to be filed from three to six.⁵⁰³

The 1981 amendments also modified the rule governing the procedure for seeking a rehearing once the court of civil appeals has rendered its judgment.⁵⁰⁴ Although the provisions governing original motions for rehearing are unchanged, rule 458⁵⁰⁵ now provides that a second motion for rehearing is unnecessary when the appellate court modifies its judgment with respect to any point that the court has already overruled. Thus, a slight or partial modification of a judgment no longer requires a second motion for rehearing to reassert all points stated in the original motion as a prerequisite to further appeal.⁵⁰⁶

In addition to the extensive changes made in the rules governing appeals, the 1981 amendments also clarified and expanded the rules governing original proceedings in the courts of civil appeals and the supreme

493. Tex. R. Civ. P. 381 (1978) required such a filing within 50 days after the rendition of a judgment or an order overruling a motion for a new trial.

494. TEX. R. CIV. P. 381.

495. TEX. R. CIV. P. 428.

496. *Id.* Formerly, such supplementation was discretionary with the court. Tex. R. Civ. P. 428 (1978).

497. TEX. R. CIV. P. 414 requires the appellant to file his brief within 30 days after the record is filed, and the appellee to file within 25 days after the appellant's brief is filed.

498. See notes 453-55 *supra* and accompanying text.

499. TEX. R. CIV. P. 385(d).

500. TEX. R. CIV. P. 414; see TEX. R. CIV. P. 415. The former rules required a showing of "good cause." Tex. R. Civ. P. 414-415 (1978).

501. TEX. R. CIV. P. 418.

502. TEX. R. CIV. P. 418(d).

503. Compare TEX. R. CIV. P. 414 with TEX. R. CIV. P. 414 (1978).

504. TEX. R. CIV. P. 458.

505. TEX. R. CIV. P. 458(b).

506. This was the case under the former rule. Tex. R. Civ. P. 458 (1978); see, e.g., *Oil Field Haulers Ass'n v. Railroad Comm'n*, 381 S.W.2d 183, 189 (Tex. 1964).

court. Prior to these amendments, two relatively brief and uninformative rules governed original proceedings.⁵⁰⁷ The 1981 amendments extensively revised these rules to provide guidance for original proceedings other than habeas corpus⁵⁰⁸ and added two new rules governing habeas corpus proceedings.⁵⁰⁹

Rule 383⁵¹⁰ now governs the procedures to be followed in the courts of civil appeals in original proceedings other than habeas corpus. Such actions are instituted by filing with the court a motion for leave to file, a petition, a brief,⁵¹¹ and a deposit for costs.⁵¹² The petition must state the grounds for the jurisdiction of the court,⁵¹³ set forth all undisputed facts necessary to establish the right to relief, contain certified or sworn copies of the order complained of and other relevant exhibits, state the relief sought, be verified, and contain a certificate of service.⁵¹⁴

Recognizing that while most mandamus actions are brought against a judge, tribunal, or other official, they in fact affect the interests of another party to an underlying proceeding, the rule requires such a party to be named in the petition as a real party in interest.⁵¹⁵ Service must then be made not only upon the actual respondent, but also upon the real party in interest.⁵¹⁶ The court may request a reply from the respondent or real party in interest, and in that case, direct that the clerk of the court notify all identified parties.⁵¹⁷ The parties may file an answer, opposing exhibits, a verified statement of facts, and a brief within seven days after mailing the notice of filing.⁵¹⁸

The court may, however, act upon the relator's motion without any prior notice to other parties and without any reply to the motion if undue prejudice or delay may result.⁵¹⁹ If the court is of the tentative opinion that the relief sought should be granted, the motion is granted, the petition is filed, and the case is set on the docket.⁵²⁰ Moreover, the court is empowered to grant temporary relief, effective until final disposition of the case,

507. Tex. R. Civ. P. 383, 474 (1978).

508. Tex. R. Civ. P. 383, 474.

509. Tex. R. Civ. P. 383a, 475.

510. Tex. R. Civ. P. 383. Although mandamus is the most common of these proceedings, others exist, including procedendo, certiorari, quo warranto, prohibition, and injunctions to protect jurisdiction or enforce a judgment.

511. Tex. R. Civ. P. 383(1)(a), (b). Three copies of each of these documents must be filed. Tex. R. Civ. P. 383(1)(b)(9).

512. Tex. R. Civ. P. 383(1)(c); see Tex. R. Civ. P. 388a.

513. Tex. R. Civ. P. 383(1)(b)(3). For a discussion of jurisdiction in such proceedings, see Sales & Cliff, *Jurisdiction in the Texas Supreme Court and Courts of Civil Appeals*, 26 BAYLOR L. REV. 501 (1974).

514. Tex. R. Civ. P. 383(1)(b)(4)-(8).

515. Tex. R. Civ. P. 383(1)(b)(2). This includes any party whose interests would be "directly affected." *Id.*

516. Tex. R. Civ. P. 383(2).

517. Tex. R. Civ. P. 383(3).

518. Tex. R. Civ. P. 383(5).

519. Tex. R. Civ. P. 383(3).

520. *Id.* If the court is not of such an opinion, the motion is overruled. *Id.*

in order to prevent prejudice to the relator.⁵²¹ Once the court grants the motion, oral argument is scheduled and the respondent or real party in interest may file a verified answer and brief.⁵²²

Rule 474⁵²³ sets forth a procedure for mandamus proceedings in the supreme court, identical to appellate court proceedings, subject to several exceptions. When the court of civil appeals shares concurrent jurisdiction, the motion should first be presented to that court.⁵²⁴ Thus, rule 474 requires that in such a case, the motion filed in the supreme court must state the date the petition was presented to the court of civil appeals and that court's action upon it, or supply a compelling reason for bypassing that court.⁵²⁵ In addition, rule 483⁵²⁶ has been amended to include a provision permitting the supreme court to expedite such proceedings when the action of the respondent conflicts with a prior opinion of the supreme court or is contrary to the Texas Constitution, statutes, or rules of civil procedure.⁵²⁷ In such cases, the supreme court may grant leave to file the petition, and upon notice and opportunity to file a written reply by the respondents, may grant the relator's writ without hearing oral argument.⁵²⁸

Unlike other original proceedings, habeas corpus proceedings, under new rules 383a⁵²⁹ and 475⁵³⁰ do not require that a relator obtain the court's permission to file the petition. Thus, no motion for leave to file is required, and no interim argument is permitted.⁵³¹ If the court is of the tentative opinion that relief should be granted, it sets bond, orders that the relator be released, and schedules oral argument.⁵³² Notice is then given, the respondents and interested parties are given an opportunity to file replies, and oral argument is held.⁵³³ The habeas corpus procedure is similar to other original proceedings in that when the court of civil appeals has concurrent jurisdiction with the supreme court the petition *must* be presented first to the court of civil appeals.⁵³⁴

Given the recent increase in the use of motions to disqualify counsel for

521. TEX. R. CIV. P. 383(4).

522. TEX. R. CIV. P. 383(6).

523. TEX. R. CIV. P. 474.

524. TEX. R. CIV. P. 474(1)(a).

525. *Id.*

526. TEX. R. CIV. P. 483.

527. *Id.*

528. *Id.* The supreme court has long had the power to reverse or alter a judgment of the court of civil appeals without oral argument when such a conflict exists in cases brought to it by writ of error. *See* TEX. R. CIV. P. 483 (1978). Until the 1981 amendments, however, it did not have this power in mandamus actions.

529. TEX. R. CIV. P. 383a.

530. TEX. R. CIV. P. 475. With two exceptions, the habeas corpus procedure is essentially the same as that for other original proceedings. *See* TEX. R. CIV. P. 383, 474 for a discussion of these proceedings. *See* notes 510-25 *supra* and accompanying text.

531. TEX. R. CIV. P. 383a, 475.

532. TEX. R. CIV. P. 383a(3), 475(4).

533. TEX. R. CIV. P. 383a(4)-(5), 475(5)-(6).

534. TEX. R. CIV. P. 475(3); *see* TEX. R. CIV. P. 474(1)(a) (in original proceedings other than habeas corpus the motion should be presented to the court of civil appeals).

a party,⁵³⁵ the opinion in *Campbell v. Buech*⁵³⁶ is important. In that case the court held that an order disqualifying counsel is not an appealable interlocutory order, despite the appellant's contention that the order's express prohibition against further participation in the case was "in the nature of an injunction."⁵³⁷ Thus, the court ruled that it was without jurisdiction and dismissed the appeal.⁵³⁸

XVII. RES JUDICATA

*Southwestern Apparel, Inc. v. Bullock*⁵³⁹ discusses the application of the doctrine of res judicata to a ruling rendered in a venue proceeding. The plaintiff initially filed suit in Travis County against the state comptroller and eleven utility companies who were not residents of the county. A number of the defendants filed pleas of privilege, which were overruled by the trial court.⁵⁴⁰ On appeal, the court of civil appeals reversed the decision of the trial court and ordered that the suits be transferred to the counties of the various defendants' residences.⁵⁴¹ Specifically, the court of civil appeals held that the plaintiff had not proved a cause of action against the comptroller.⁵⁴² Thereafter, the plaintiff dismissed the suit against the eleven utility companies, leaving the comptroller as the sole defendant. The trial court subsequently dismissed the suit against the comptroller,⁵⁴³ and on an appeal from such action, the comptroller argued that the dismissal was proper because the earlier appellate decision constituted a bar to further action against him. Rejecting this argument because it presupposed that the decision in the earlier appeal was a final judgment disposing of all issues and parties, the appellate court held that the previous ruling on the plea of privilege was to be treated as final only insofar as it disposed of venue issues.⁵⁴⁴

*Aguilar v. Abraham*⁵⁴⁵ indicates that mutuality of parties is not a requirement for the application of collateral estoppel. The plaintiff in *Aguilar*, an attorney, had filed suit against another attorney regarding the ownership of a case. After an adverse determination, the plaintiff filed a second suit against the same attorney and two other members of his law

535. See generally Note, *Motions to Disqualify Counsel Representing an Interest Adverse to a Former Client*, 57 TEXAS L. REV. 726 (1979).

536. No. 16410 (Tex. Civ. App.—San Antonio Nov. 14, 1979) (unreported).

537. *Id.*

538. *Id.*

539. 598 S.W.2d 702 (Tex. Civ. App.—Austin 1980, no writ).

540. *Id.* at 703.

541. *Houston Natural Gas Corp. v. Southwestern Apparel, Inc.*, 558 S.W.2d 950, 954 (Tex. Civ. App.—Austin 1977, writ dismissed).

542. *Id.* at 953.

543. 598 S.W.2d at 703.

544. *Id.* at 704; see *Wichita Falls & S.R. v. McDonald*, 141 Tex. 555, 558, 174 S.W.2d 951, 952-53 (1943).

545. No. 6815 (Tex. Civ. App.—El Paso Oct. 31, 1979) (unreported); see *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971); *Olivarez v. Broadway Hardware, Inc.*, 564 S.W.2d 195, 198-99 (Tex. Civ. App.—Corpus Christi 1978, writ refused n.r.e.); *Hardy v. Fleming*, 553 S.W.2d 790, 792-93 (Tex. Civ. App.—El Paso 1977, writ refused n.r.e.).

firm. Recognizing that the identical issue of ownership had previously been determined against the plaintiff, the court of civil appeals affirmed the trial court's dismissal of the second suit based on the doctrine of collateral estoppel even though it involved two defendants who were not parties to the first suit.⁵⁴⁶

XVIII. MISCELLANEOUS

Two supreme court decisions rendered during the survey period provide guidance as to the procedure for remittitur.⁵⁴⁷ In *Moore v. Grantham*⁵⁴⁸ the supreme court reversed a judgment because the trial court had allowed the introduction of inadmissible expert opinion testimony on the plaintiff's loss of future earning capacity.⁵⁴⁹ On motion for rehearing, the plaintiff offered to remit the portion of the judgment that awarded her a sum for loss of future earning capacity and she requested that the judgment of the trial court be reformed in order to eliminate that recovery. Granting the plaintiff's request, the supreme court affirmed the remaining portion of the judgment in favor of the plaintiff and concluded that

"where the portion of a jury's verdict tainted with misconduct, or improperly arrived at, is capable of definite and accurate ascertainment, and where the jury acted free from prejudice and passion, a remittitur of the portion so tainted or improperly arrived at will cure the error, and the part of the verdict free from the taint of misconduct and properly arrived at will be permitted to stand."⁵⁵⁰

Another remittitur case, *City National Bank v. Jacksboro National Bank*,⁵⁵¹ involved an appeal from a suit to recover proceeds from the sale of property securing a promissory note. After the plaintiff recovered a judgment based on a favorable jury verdict, the defendant filed a motion for a new trial and, alternatively, requested a remittitur. The trial court granted the motion for new trial conditioned on the plaintiff's failure to accept a remittitur.⁵⁵² Thereafter, the plaintiff tendered a "remittitur under protest" and appealed. The court of civil appeals found that the order of remittitur was invalid and modified the trial court's judgment by striking the remittitur.⁵⁵³ The supreme court, however, held that the appeal should have been dismissed because the defendant, the party benefited by the remittitur, did not appeal from the trial court's judgment.⁵⁵⁴ The supreme court relied on the language of rule 328,⁵⁵⁵ which expressly

546. No. 6815, slip op. at 3.

547. TEX. R. CIV. P. 315, 328, 439-441 govern remittitur procedure in district courts and courts of civil appeals.

548. 599 S.W.2d 287 (Tex. 1980).

549. *Id.* at 289-91.

550. *Id.* at 292 (quoting *Texas Employer's Ins. Ass'n v. Lightfoot*, 139 Tex. 304, 309, 162 S.W.2d 929, 931 (1942)). See generally *Ogle v. Craig*, 464 S.W.2d 95, 98 (Tex. 1971).

551. 602 S.W.2d 511 (Tex. 1980) (per curiam).

552. *Id.* at 511.

553. 592 S.W.2d 672, 675 (Tex. Civ. App.—Fort Worth 1979).

554. 602 S.W.2d at 512.

555. TEX. R. CIV. P. 328.

provides: "whenever the court shall direct a remittitur in any action, . . . and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required" ⁵⁵⁶

Article 2226, ⁵⁵⁷ which authorizes the recovery of a reasonable attorneys' fee in connection with the successful prosecution of certain types of claims, was amended in 1977 to allow recovery of attorneys' fees in actions "founded on oral or written contracts." ⁵⁵⁸ *Brophy v. Brophy*, ⁵⁵⁹ *Villiers v. Republic Financial Services, Inc.*, ⁵⁶⁰ and *Duval County Ranch Co. v. Alamo Lumber Co.* ⁵⁶¹ discuss the application of article 2226 to actions tried after the effective date of the 1977 amendment. In *Brophy* the suit was on a contract made in 1967. Finding that "[b]oth the breach of the contract and the suit to recover the delinquent payments occurred after the effective date of the [1977] amendment," the court held that article 2226 was applicable and, therefore, that the plaintiff was entitled to recover attorneys' fees for the successful prosecution of her action. ⁵⁶²

In *Villiers*, another contract action, the defendant contended that attorneys' fees were not allowable because all of the transactions giving rise to the suit occurred before the enactment of the 1977 amendment. Rejecting the defendant's contention, the court of civil appeals held that attorneys' fees were proper because the trial of the case had occurred after the effective date of the amendment. ⁵⁶³ The court relied on the general rule that "statutes dealing with a remedy, as distinguished from a right or cause of action, are to be applied to actions tried after their passage even though the right or cause of action arose prior thereto." ⁵⁶⁴

Finally, in *Duval County Ranch Co.* the defendant argued that attorneys' fees were not proper in an action founded, in part, on a written contract executed in 1972. ⁵⁶⁵ The court concluded that because the trial of the action occurred after the 1977 amendment, attorneys' fees were recoverable. ⁵⁶⁶ The court also rejected the defendant's claim that attorneys' fees were not recoverable because an excessive demand had been made by the plaintiff-creditor upon the defendant-debtor. ⁵⁶⁷ Recognizing the rule that "when a creditor makes an excessive demand upon his debtor, he is not entitled to attorneys' fees for subsequent litigation to recover the debt," the

556. *Id.*; see 602 S.W.2d at 512.

557. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1980-1981).

558. *Id.*

559. 599 S.W.2d 345 (Tex. Civ. App.—Texarkana 1980, no writ).

560. 602 S.W.2d 566 (Tex. Civ. App.—Texarkana 1980, no writ).

561. 597 S.W.2d 528 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).

562. 599 S.W.2d at 347.

563. 602 S.W.2d at 572.

564. *Id.* The court also noted that in 1979 the Texas Legislature amended art. 2226 to express the legislative intent that "[t]his Act is remedial in character and is intended to apply to all pending and future actions, regardless of the time of institution thereof or of the accrual of any cause of action asserted." *Id.*

565. 597 S.W.2d at 530.

566. *Id.*

567. *Id.* at 531.

court held that both a demand for more than is tendered and a refusal of the tender must be made before the defense of excessive demand is applicable.⁵⁶⁸

Phipps v. Miller,⁵⁶⁹ a personal injury action, illustrates the utility of rule 174,⁵⁷⁰ which governs the use of separate trials. The trial court granted a separate trial on the defendant's limitations defense.⁵⁷¹ After an adverse determination on the limitations point, the plaintiff appealed and argued that the trial court had erred in holding a separate trial on the limitations defense. Affirming the action of the trial court, the court of civil appeals found that by trying the limitations question separately, "the time and expense of a full blown trial on the extent of the injury and the amount of expenses incurred were avoided."⁵⁷² The court also noted that the trial court's action was justified because the separate trial on limitations helped "avoid prejudice" to the defendant by preventing reference to the existence of insurance which, under the facts, was a critical element of the limitations defense.⁵⁷³

In addition to the foregoing decisions, other miscellaneous developments occurred as a result of the 1981 amendments to the Texas Rules of Civil Procedure. Rule 12⁵⁷⁴ was modified to permit a challenge to the authority of the plaintiff's attorney to prosecute the suit; the rule now subjects all attorneys to a challenge that they are in court without authority. Under new rule 14c⁵⁷⁵ a party may, in lieu of a surety bond, deposit cash or a negotiable obligation of the United States Government or, alternatively, may upon leave of the court deposit a negotiable obligation of any bank or savings and loan association chartered by the United States Government or any state government. Under rule 21⁵⁷⁶ a party filing a motion is required to serve the motion upon the adverse party "not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court."⁵⁷⁷ As a result of additions made to rule 21 by the recent amendment, however, the three-day notice requirement is now applicable to all forms of requests for a court order. With respect to an attorney's attendance at a legislative session as a ground for a continuance, amended rule 254⁵⁷⁸ eliminates a conflict between it and article 2168a,⁵⁷⁹ which addresses the same subject. Rule 254 now authorizes continuances based upon an attorney's attendance at a legislative session

568. *Id.* at 531; see *Collingsworth v. King*, 155 Tex. 93, 98-99, 283 S.W.2d 30, 33 (1955); *Warrior Constructors, Inc. v. Small Business Inv. Co.*, 536 S.W.2d 382, 386 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

569. 597 S.W.2d 458 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

570. TEX. R. CIV. P. 174.

571. 597 S.W.2d at 459.

572. *Id.* at 460.

573. *Id.*

574. TEX. R. CIV. P. 12.

575. TEX. R. CIV. P. 14c; see *Pope & McConnico*, *supra* note 1, at 487.

576. TEX. R. CIV. P. 21.

577. *Id.*; see *Pope & McConnico*, *supra* note 1, at 487-88.

578. TEX. R. CIV. P. 254.

579. TEX. REV. CIV. STAT. ANN. art. 2168a (Vernon Supp. 1980-1981).

not only during the legislative session, but also within thirty days of the session.⁵⁸⁰ Finally, rule 684,⁵⁸¹ which requires a party seeking a temporary restraining order or a temporary injunction to post a bond, was modified to leave the amount of the bond entirely to the discretion of the trial court.⁵⁸²

In 1978 the Texas Supreme Court amended the rules of civil procedure governing attachment,⁵⁸³ garnishment,⁵⁸⁴ and sequestration⁵⁸⁵ in an effort to bring those rules into compliance with federal due process standards. The rules of civil procedure related to distress warrants⁵⁸⁶ and trials of right of property⁵⁸⁷ were amended in 1981 in order to achieve a similar result with respect to those procedures.

580. TEX. R. CIV. P. 254; *see* Pope & McConnico, *supra* note 1, at 488.

581. TEX. R. CIV. P. 684.

582. Formerly, the rule provided that "[i]f the injunction be applied for to restrain the execution of a money judgment or the collection of a debt, the bond shall be fixed in the amount of such judgment or debt, plus a reasonable amount to cover interest and costs." TEX. R. CIV. P. 684 (1978).

583. TEX. R. CIV. P. 592-609.

584. TEX. R. CIV. P. 657-679.

585. TEX. R. CIV. P. 696-716.

586. TEX. R. CIV. P. 610-614a. TEX. R. CIV. P. 615-620, which also relate to distress warrants, were left unchanged.

587. TEX. R. CIV. P. 717-734.

